LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 9 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ...335

FLORIDA EAST COAST RAILWAY,
a Florida corporation,
Petitioner,

v.

MARTIN COUNTY, a Political Subdivision
of the State of Florida,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

DAVID W. PECK,
ROY H. STEYER,
Counsel for Petitioner
48 Wall Street
New York, N. Y. 10005

DAVID A. DONOHOE,
SULLIVAN & CROMWELL,
Of Counsel

July 9, 1965

INDEX

PAGE

Citations to Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions Involved 3

Statement 3

Reasons for Granting the Writ 7

Conclusion 12

APPENDIX A—United States Constitution:

Fourteenth Amendment, Section 1 ..... A-1

Article 1, Section 8, Clause 3 ..... A-1

APPENDIX B—Opinions and Judgment Below:

Opinion of the Supreme Court of Florida, filed January 20, 1965 ..... B-1

Opinion and Order of the Florida Circuit Court Striking Portions of Petitioner's Answer, filed November 30, 1962 ..... B-24

Opinion and Order of the Florida Circuit Court Denying Petitioner's Motion for Rehearing, filed February 20, 1963 ..... B-32

Opinion and Order of the Florida Circuit Court (on Petition and Answer) Directing Jury Trial of Issue of Damages as Limited by its Orders, filed February 20, 1963 ..... B-35

Mandate from Supreme Court of Florida B-47

APPENDIX C—Portions of Record in Which Constitutional Issues Were Raised C-1

CITATIONS

PAGE

CASES:

Atchison, T. & S. F. Ry. v. *Pub. Util. Comm'n.*, 346 U. S. 346 (1953) 9

Chesapeake & Ohio Ry. Co. v. *Michigan Pub. Serv. Comm'n*, 347 Mich. 234, 79 N. W. 2d 586 (1956) 8

Chicago, B. & Q. R. Co. v. *Chicago*, 166 U. S. 226 (1897) 4, 6, 8

Nashville, C. & St. L. Ry. v. *Walters*, 294 U. S. 405 (1935) 4, 5, 6, 8, 9, 11

Southern Pacific Co. v. *Arizona*, 325 U. S. 761 (1945) 11

UNITED STATES CONSTITUTION:

Fourteenth Amendment, § 1 3

Article I, § 8, Clause 3 3

STATUTES:

28 U. S. C. 1257(3) (1958) 2

MISCELLANEOUS:

Annot., 4 A. L. R. 137 (1919) 8

I. C. C. REPORT, *Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles*, 322 I. C. C. 1 (1964) 7, 9, 10

STATISTICAL ABSTRACT OF THE UNITED STATES (1963) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

FLORIDA EAST COAST RAILWAY,
a Florida corporation,

Petitioner,

v.

MARTIN COUNTY, a Political Subdivision
of the State of Florida,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida, entered in the above-entitled case on January 20, 1965.

CITATIONS TO OPINIONS BELOW

The opinion and order of the Florida Circuit Court granting respondent's motion to strike portions of petitioner's answer (R. 147-153)* is unreported and is printed in Appendix B hereto, *infra,* pp. B-24—B-31. The opinion and order of the Florida Circuit Court denying petitioner's motion for rehearing (R. 964-966) is unreported and is

*This and similar references are to the page numbers (in red) of the certified record filed herewith.

printed in Appendix B hereto, *infra*, pp. B-32—B-34. The opinion and order of the Florida Circuit Court on the petition and answer, which ordered that the issue of damages to petitioner be tried by a jury in accordance with the limitations set forth in the above-mentioned opinions and orders (R. 967-977), is unreported and is printed in Appendix B hereto, *infra*, pp. B-35—B-46. The opinion of the Supreme Court of Florida (R. 1381-1399), printed in Appendix B hereto, *infra*, pp. B-1—B-23, is reported in 171 So. 2d 873.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on January 20, 1965. (R. 1423; *infra*, pp. B-47-48.) Rehearing was denied on March 15, 1965. (R. 1411.) Mr. Justice Black signed an order on June 8, 1965 extending the time for filing a petition for writ of certiorari to and including July 9, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3) since petitioner claims a right under the Constitution of the United States.

QUESTIONS PRESENTED

A county in Florida condemned an easement for a public road at grade across a railroad's tracks. The Supreme Court of Florida held, on a question of first impression in Florida, that the railroad could not plead or offer proof of damages on the costs of constructing and maintaining the grade crossing and the automatic crossing protection devices needed to safeguard persons and property using the crossing. The basis for decision was that all such costs must be borne by the railroad because they are the result of the exercise of the "police power" of the state and therefore

not attributable to the taking. The Florida Court relied for its holding on an 1897 decision of this Court, although the revolution in commercial transportation in this century has made that decision inapposite.

The questions presented are:

1. Does a State's automatic imposition on a railroad of the entire cost of constructing and maintaining grade crossings and the protection devices needed to safeguard those using such crossings violate the Fourteenth Amendment to the United States Constitution by depriving the railroad of its property without due process of law and by denying to the railroad the equal protection of the laws?

2. Does the automatic imposition of these costs in their entirety on the railroad violate Article I, Section 8, Clause 3, of the United States Constitution by imposing an unlawful burden on interstate commerce?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions relied on are Section 1 of the Fourteenth Amendment, and Article I, Section 8, Clause 3 (the "interstate commerce clause"), of the United States Constitution. The pertinent portions thereof are printed in Appendix A hereto, *infra*, p. A-1.

STATEMENT

Martin County, a political subdivision of Florida, filed a condemnation petition on May 31, 1962 to acquire an easement for a public road at grade across the main line tracks of Florida East Coast Railway, which operates along the east coast of Florida and is engaged in interstate com-

merce. (R. 1-9, 99-100.) The Railway's answer (Par. Seventh) pleaded as damages the expenses it would necessarily incur, because of the creation of the grade crossing, in constructing, operating and maintaining not only the crossing itself but also the automatic crossing protection devices, such as lights, bells and gates, needed to protect the persons and property using the proposed crossing. It was alleged that these construction expenses would exceed $22,000 (more than $20,000 thereof for the protection devices) and that annual operation and maintenance charges would exceed $1,100 (more than $800 thereof for the protection devices). (R. 105-106.)

Martin County moved to strike this portion of the Railway's answer on the ground that such expenses were not allowable. (R. 109-11.) The motion to strike was granted on November 30, 1962 by the Circuit Court for the Ninth Judicial Circuit of Florida. (R. 147-153; printed *infra*, pp. B-24—B-31.) In its opinion, the Circuit Court held that these expenses were not compensable because they were costs of railroading which arose "not out of the taking but out of the operation of the railroad in the public interest." (R. 152; *infra*, p. B-30.) It further held that the Constitution of the United States did not require payment of such expenses, relying on this Court's 1897 decision in *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, and quoted a portion of that opinion which stated that such expenses "must be regarded as incidental to the police powers of the state." (R. 148; *infra*, p. B-25.)

The Railway filed a motion for rehearing, claiming that the imposition of all such costs on it would violate its rights under the Fourteenth Amendment to the Constitution. It cited the enormous changes in railroad and automobile traffic and relied upon this Court's 1935 opinion in *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, which

held, with reference to the automatic imposition on railroads by a 1921 Tennessee statute of 50% of grade separation costs, that an exercise of the police power valid as to one set of facts may become unconstitutionally arbitrary and unreasonable by change in the conditions to which it is applied. (R. 292-296.) This motion was denied on February 20, 1963 by an opinion and order which purported to distinguish the *Nashville* case. (R. 964-966; printed *infra*, pp. B-32—B-34.)

Subsequent to the motion for rehearing, but before decision of the motion, a non-jury trial was had on other issues of the condemnation raised in the petition and answer—issues not offered for review by this Court —and the Florida Circuit Court held on February 20, 1963 that the County had established its right to proceed with the condemnation and directed a trial by jury on the issue of damages to the Railway "in accordance with the limitations set forth in the Order of this Court dated November 30, 1962, and the Order denying Motion for Rehearing of that Order entered this same date." (R. 977; printed *infra*, p. B-46.)

At the valuation trial, the Railway made an offer of proof of the expenses of constructing, operating and maintaining the proposed grade crossing and automatic crossing protection devices. All such proof was rejected by the trial court (R. 1137-1138; 1002-1006.), and a verdict was returned by the jury for $200.00, as the value of the easement condemned. (R. 1061.) The Railway moved for a new trial and also to set aside the above-mentioned orders, again claiming that its rights under the United States Constitution had been violated. (R. 1034-1038.) This motion was denied without opinion and judgment entered on the jury verdict plus the court's award of attorneys' fees and costs. (R. 1059-1066.)

The Railway appealed to the District Court of Appeals of Florida, Second District (R. 1273-1274; 1288-1289), which transferred the appeal to the Supreme Court of Florida. (R. 1418-1421.) In its assignment of errors the Railway again claimed that it had been deprived of its property in derogation of its Constitutional rights by reason of the Court's imposition on it of the total expenses of constructing, operating and maintaining the grade crossing and protective devices. (*e.g.*, No. 23, R. 1279; see also No. 8, R. 1276.) On January 20, 1965 the Supreme Court of Florida affirmed (except with respect to the allowance of certain expert witness fees taxed as costs).

With respect to the question in issue here (referred to in its opinion as "Point No. 3" and dealt with in the portions thereof appearing at R. 1382-1383, 1385-1389, printed *infra* at pp. B-3, B-6—B-11), the Florida Supreme Court affirmed on the authority of this Court's 1897 decision in *Chicago, B. & Q. R. Co.* v. *Chicago, supra.* It declared that, despite the revolutionary changes in transportation, the expenses to which the Railway might be put with respect to the grade crossing and automatic crossing protection devices are "the result of the exercise of the police powers of the state", by that token not a loss due to the taking, and therefore not compensable as damages in the condemnation. (R. 1388, printed *infra,* p. B-10.) The court made no mention of this Court's 1935 opinion in *Nashville, C. & St. L. Ry.* v. *Walters, supra.* The Railway made a timely petition for rehearing (R. 1401-1409), again raising Constitutional issues, which was denied without opinion on March 15, 1965. (R. 1411.)

Petitioner timely and properly raised the Constitutional issues in both the trial court and the Supreme Court of Florida, as outlined above. Printed in Appendix C, *infra,* pp. C-1—C-4, are pertinent quotations of specific portions

of the record in which the federal questions sought to be reviewed were raised.

REASONS FOR GRANTING THE WRIT

1. The questions decided below and presented for review by this Court are of importance to the entire railroad industry, as well as to State and local authorities, because the allocation of costs of installing and maintaining rail-highway crossings and protective devices is a significant and recurring problem. It was a central part of a three-year study by the Interstate Commerce Commission culminating in an extensive report in 1964, entitled "Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles", 322 I. C. C. 1, which is discussed below. Although the present action originated as a condemnation of a single crossing, the Florida court's absolute disregard of the railroad's right to receive compensation for the costs of the grade crossing and automatic crossing protection devices, on the ground that such costs could not as a matter of law be attributable to the taking because they are the result of an exercise of the police power, has far-ranging implications. The inevitable meaning of the holding is that henceforth, when as the result of a determination by a county or other public body of the State of Florida, certain expenditures become necessary in connection with the establishment of railroad crossings or the reduction or elimination of railroad crossing hazards—whether the crossings be new or existing—these expenses may automatically be imposed in their entirety on a railroad without reference to the particular existing circumstances that should determine an allocation of such costs.*

*The rule followed by the Florida Supreme Court has in the past been applied in other States, but as the Florida court acknowledged (R. 1385; printed *infra*, p. B-6), the decisions in other States

2. To reach its result, the Florida court relied on an 1897 opinion of this Court which was applicable to completely different circumstances, and the result reached conflicts in principle with a 1935 opinion of this Court that the imposition of costs on a railroad in exercise of the police power may be unconstitutionally arbitrary in the light of changed circumstances. The Florida court relied on *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226 (1897), which was decided at a time when the economic position of the railroads, the relative benefit of grade crossings to railroads and motor vehicles, and the relative responsibility of railroad and motor vehicles for accidents at crossings, were vastly different from conditions today. The Florida court completely ignored the clear mandate of this Court in *Nashville, C. & St. L. Ry.* v. *Walters,* 294 U. S. 405 (1935), that consideration must be given in allocating railroad crossing costs to the currently existing circumstances, such as: who receives the benefits of the project, the great changes that have taken place in commercial transportation in the 20th century, and the problem of whether railroads, burdened with the proposed expenses, can reasonably be expected to compete effectively with motor vehicles. In dealing there with a 10-year old statute automatically imposing on railroads 50% of the costs of the separation of grades, this Court stated:

> "A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied. The police power is subject to the constitutional limitation that it may not be ex-

---

are not uniform. See Annot., 4 A. L. R. 137 (1919); *Chesapeake & Ohio Ry. Co.* v. *Michigan Pub. Serv. Comm'n.,* 347 Mich. 234, 79 N. W. 2d 586, 589-90 (1956).

> erted arbitrarily or unreasonably." (294 U. S. at 415) [Footnotes omitted]

In other words, unless the assessment of the cost of public improvements bears a fair and reasonable relationship to the specific circumstances and persons involved, the assessment must be declared arbitrary and discriminatory. *Atchison, T. & S. F. Ry.* v. *Pub. Util. Comm'n,* 346 U. S. 346, 349, 353-4 (1953). In the instant case, absolutely no consideration was even permitted—and certainly not given—to the existing circumstances and their relationship to the Railway and the County, because these circumstances were submerged by the Florida court's sterile resort to a "police power" concept.

The changes caused by the widespread introduction of motor vehicles have been recognized judicially by the courts at least since the *Nashville* decision in 1935. This Court noted in the *Nashville* case (294 U. S. at 422-3):

> "The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation." [Footnote omitted]

This conclusion was reinforced by the Interstate Commerce Commission in its 1964 report entitled "Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles" (322 I. C. C. 1-92), where it found:

> "(1) That the principal cause of grade crossing accidents is failure of motor carrier operators to stop or exercise due care and caution or to observe and comply with existing safety laws and regulations." (322 I. C. C., at 86)

The I. C. C. further noted in its report:

> "Because of the sharp acceleration of highway improvement, decrease in the number of trains operated, and the tremendous increase in vehicular traffic in the past few years, together with further increases that may be expected in the future, there is a real problem as to how grade-crossing improvements are to be financed. It is quite evident that most of the benefits to be derived from any stepped-up improvement program of highway safety, especially at rail-highway grade crossings will be to the drivers of motor vehicles. For this reason it would be unfair to expect the railroads to assume this heavy financial burden. When considering this problem in 1944, the president of the American Association of State Highway Officials said:
>
> > 'If all installations and separations which might be justified by the explosive growth of motor vehicle traffic were actually carried out, the railroads would be bankrupt if they were required to pay all or even a very substantial part of the cost. The only way to get the speed in grade crossing elimination and automatic protection, which may be demanded, is for the public to assume the cost.'" (322 I. C. C., at 83)

The I. C. C. then made the finding:

> "(13) That highway users are the principal recipients of the benefits flowing from rail-highway grade crossings. For this reason the cost of installing and maintaining such separations and protective devices is a public responsibility and should be financed with public funds the same as highway traffic devices." (322 I. C. C., at 87)

When the *Nashville* case was decided, only 362,000 motor vehicles were registered in the State of Florida, whereas in 1962, when this action began, there were some 2,593,000 motor vehicles registered in Florida—an increase of nearly 700%. *Statistical Abstract of the United States* (1963), p. 568. During the period from 1946 to 1960, the train miles operated by the railroads in the United States declined from about 1.3 billion per year to approximately 658 million per year—a decline of about 50%—whereas motor vehicle miles increased from 340.9 billion ton miles to 718.8 billion—an increase of approximately 110% and representing more than one thousand times the train miles of railroads. (R. 331-332.)

From 1948 to 1959, railroads in the United States spent almost $182 million for reducing and eliminating grade crossing hazards (of which over $90 million was for protection devices), and this represented only 31% of the total spent by federal, state and local governments and railroads combined. (R. 321-325, 330.) An increase in such a burden would be a blow to a healthy industry; to the railroads it could be catastrophic.

3. An arbitrary and unreasonable assessment of railroads of the nature here involved necessarily constitutes, as well, an unlawful burden on interstate commerce. That Congress has not yet stepped forward to protect railroads from this type of discrimination does not give the states license to saddle these instrumentalities of interstate commerce with unreasonable burdens. *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 769 (1945). The trial court in this case conceded that ". . . the question may also be stated whether a railroad may be required to expend in excess of $22,000.00 for every grade crossing which is forced upon it by a county or other public body and for which it

receives only nominal compensation. Such a determination might well increase the cost of railroading to such a point that it could no longer be operated as a private business with a profit incentive." (R. 151; printed *infra,* p. B-28.) It nevertheless went on to find that the Railway must bear the entire cost, without any allocation to the county or other public body. The Supreme Court of Florida, perhaps recognizing the inconsistency below, said instead: "It appears logical and reasonable to *assume* that there has also been a great increase in the revenue of the appellant Railway." (Emphasis supplied.) (R. 1389; printed *infra,* p. B-10.) As a matter of fact, the Railway had just emerged from reorganization in 1961 (R. 155), about a year before this dispute developed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID W. PECK,
ROY H. STEYER,
Counsel for Petitioner
48 Wall Street
New York, N. Y. 10005

DAVID A. DONOHOE,
SULLIVAN & CROMWELL,
Of Counsel

July 9, 1965

APPENDIX A

UNITED STATES CONSTITUTION

Fourteenth Amendment, Section 1

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 8, Clause 3

"The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ."

APPENDIX B

OPINION OF THE SUPREME COURT OF FLORIDA— JANUARY 20, 1965

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1965

FLORIDA EAST COAST RAILWAY COMPANY, a Florida corporation, *Appellant,* *vs.* MARTIN COUNTY, a Political Subdivision of the State of Florida, et als., *Appellees.*	CASE No. 32,970

Opinion filed January 20, 1965

An Appeal from the Circuit Court for Martin County, C. Pfeiffer Trowbridge, Judge

John B. L'Engle and Sumner & Sumner, for Appellant

Dean Tooker, for Appellees

HOBSON, *J.* (Ret.)

The appellee Martin County brought this condemnation suit against the Florida East Coast Railway Company and its mortgagees in the Circuit Court of the Ninth Judicial Circuit, in and for Martin County, Florida, for the purpose of acquiring a public easement fifty feet in width. Martin County proposed to locate a public county road over the railroad's tracks.

Appendix B
Opinion of the Supreme Court of Florida—
January 20, 1965

All of the matters in controversy between Martin County and the Florida East Coast Railway Co., et al., except for the amount of damages for the taking, were decided, without a jury, by the trial Judge Honorable C. Pfeiffer Trowbridge in favor of Martin County and against Florida East Coast Railway Co., et al. Trial by jury was had upon the issue of damages to the Florida East Coast Railway Co., et al.

Appellant being aggrieved by several of the rulings of of the trial judge as well as the entry of the final judgment instituted an appeal to the District Court of Appeal, Second District, which Court, after determining that jurisdiction of this case on appeal was in the Supreme Court of Florida, entered an order transferring the cause to this Court.

Counsel for appellant contend that there are nine points involved on this appeal. They state and argue them in the sequence of time at which they arose. We will now attempt to state these nine points and thereafter discuss those points which we deem worthy of serious consideration.

Point No. 1 raises the question whether it was error for the trial court to deny the Railway's motion to dismiss directed to the petition and its exhibits. It is said that the petition and exhibits failed to show that the easement sought to be taken was for a lawful public purpose.

Point No. 2 is a challenge to the order of the trial judge denying the motion to strike filed by the Florida East Coast Railway Co., which order bears date October 10, 1962. The motion to strike was directed to five WHEREAS paragraphs of the resolution of the Board of County Com-

missioners which was annexed to and made a part of the petition filed by Martin County. It is urged that the matters contained in the five WHEREAS paragraphs are irrelevant and immaterial.

Point No. 3 assails the order of the trial court entered November 30th, 1962, granting Martin County's motion to strike designated parts of the Railway's answer. The portions of the answer which were stricken were allegations of special damages: "(a). the cost of grading and paving, and annual cost of maintenance of the grade crossing, and (b) cost of installation of automatic crossing protection devices—flashing lights, bells, and gates, and maintenance of same, all alleged to be reasonably necessary to reduce the great hazards and dangers to persons and property using the proposed grade crossing * * *".

Point No. 4 is directed to the order on petition and answer entered by the trial court on February 20, 1963. The effect of this order was that Martin County had established its right to proceed with the condemnation of the easement sought, notwithstanding the Railway's contention that Martin County was without power to acquire the easement because of the hazards to life, limb and property that would be presented by a grade crossing at the site prayed at M. P. 260 plus 122 feet, and material interference with interstate commerce.

Point No. 5 raises the query whether the trial judge erred when he overruled objections to certain photographs and testimony depicting safety conditions at established public road grade crossings distant from site of the proposed public road grade crossing.

Appendix B
Opinion of the Supreme Court of Florida—
January 20, 1965

Point No. 6 poses the question whether the trial court erred in overruling a challenge for cause requested by counsel for the Railway Company directed toward a juror who admitted that he had seen and heard as a spectator the "last hour" of the trial before the court without a jury.

Point No. 7 directs our attention to the refusal of the trial judge to include in the Judgment for Costs the full amount of $3,355.54 which was testified to as being a fair and reasonable fee for the services of the civil engineer who qualified as an expert witness and testified for the Railway Company in support of certain affirmative defenses but he did not testify with reference to the value of the easement sought to be taken. The trial judge allowed this expert witness $1,438.25, instead of $3,355.54. Appellant contends that the latter and higher amount should have been allowed. On the other hand by a cross-assignment of error the appellee, Martin County, insists that the trial judge erred in allowing any fee for this witness.

Point No. 8 is an assault by appellant Railway Company upon the trial court's failure to tax as costs the sum of $192.25, which sum was paid by the Railway Company to the court reporter for a carbon copy of the Transcript of Testimony and copy of a deposition admitted in evidence.

Point No. 9 presents a question which is of great interest to most, if not all, practicing attorneys. The question is one of reasonable attorney fees. Two qualified attorneys testified respectively to $10,000.00 and $9,000.00 as reasonable attorney fees to be allowed the Railway Company for the services of its attorneys in this case. There was no other testimony upon this subject and the trial judge allowed the sum of $6,000.00 as attorney fees. Counsel for the

Railway Company say the allowance should not have been less, under the facts and circumstances, than $9,000.00, while counsel for Martin County insist that the fee allowed by the trial court of $6,000.00 should, by this Court, be substantially reduced.

We turn now to a discussion of these nine points which have been presented by appellant for our consideration.

Points 1 and 2 will be treated together. We have examined the petition and have determined that it is not fatally defective and that the motion to dismiss said petition was properly denied. The petition complies with the requirements of Section 73.01, Florida Statutes. Counsel for appellant have apparently confused necessary allegations with ultimate essential proof. It is true, as contended by appellant, that property condemned for a public road or easement must be a connecting link betwen public roads or properties. They have cited many of our decisions to this effect. The statute, however, does not require the petition to allege on this point anything more than the following: "The authority under which, and the public use to which, the property is to be acquired, and that the property is necessary for that use;". The appellant had the right to challenge the allegation of a valid public purpose as a matter of fact and the record discloses that it did just that. After a trial before the court without a jury on this issue, appellant was unsuccessful.

Appellant contends that the description of the property or easement sought to be condemned was insufficient, but we find that said description complies with Section 73.01(2), Florida Statutes, in that it is sufficient for the identification

by appellant or any other interested person of the easement sought to be acquired.

With reference to the "WHEREAS" clauses, suffice it to say that although they may not have been absolutely essential they are not wholly irrelevant and immaterial because they are a part of the public records kept by the Board of County Commissioners to serve to inform the public of the Board's actions and the reasons for its actions. Moreover, it appears to us that it is entirely proper for the Court, as well as the condemnee, to be advised of the findings which motivated the Board of County Commissioners.

We find no merit in appellant's contention that because the survey map (petitioner's Exhibit 6) includes both Alice Avenue West and the easement to be condemned, this exhibit proves that Alice Avenue West in fact is not public.

In his order of November 30th, 1962, the trial judge stated that the question which is the subject matter of appellant's Point No. 3 "appears to be one of first impression in the State of Florida." We agree with this observation.

The order entered by the presiding Judge is quite lengthy. We will not quote it in full but will attempt to summarize the reasons for his conclusion and determination that the motion to strike should be granted.

In his order, the judge recognized the fact that the decisions in other jurisdictions are not uniform. He found, however, the majority rule to be against appellant's contention.

The decision upon which he strongly relied is the one by the Supreme Court of the United States in Chicago, Burlington & Quincy Railroad Company v. Chicago, 166

Appendix B
Opinion of the Supreme Court of Florida—
January 20, 1965

U. S. 226. The United States Supreme Court in its opinion, at page 255, stated:

> "The expenses that will be incurred by the railroad company in erecting gates, planking the crossing, and maintaining flagmen, in order that its road may be safely operated—if all that should be required—necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken by the company into account when it accepted the privileges and franchises granted by the State. Such expenses must be regarded as incidental to the exercise of the police powers of the State. What was obtained, and all that was obtained by the condemnation proceedings for the public was the right to open a street across land within the crossing that was used, and was always likely to be used, for railroad tracks. While the city was bound to make compensation for that which was actually taken, it cannot be required to compensate the defendant for obeying lawful regulations enacted for the safety of the lives and property of the people."

Appellant argue somewhat forcefully that the decision in the Chicago, Burlington & Quincy Railroad case, which was rendered in the year 1897, should not be applied in this era of modernity; that there were few motor vehicles in existence prior to the turn of the century and offered statistics to show the tremendous volume of vehicular traffic in this nation and particularly in the State of Florida at

the time of the trial. Moreover, counsel for appellant insist that the Supreme Court of Florida has been liberal in its construction of our constitutional provisions as well as our statutory law which provide for "full" and "just" compensation to the owner of land which is taken in any eminent domain proceeding.

We realize that this Court has demonstrated a tendency toward liberality in construing the words "just" and "full" compensation. Consequently, we are impelled to say to counsel for appellant that which was stated by King Agrippa to the Apostle Paul, Acts 26:28, "Almost Thou persuadest [us] * * *."

In Dade County v. Brigham, (Fla.) 47 So. 2d 602, we approved the inclusion in the judgment of the reasonable fees paid by the condemnee to expert witnesses who testified to the value of the land sought to be taken. We were of the view, and still are, that a property owner whose land is taken from him upon the theory of a genuine public need therefor does not receive "just" or "full" compensation if he is required to pay such expert witnesses from the monies received for the value of his land and that upon the issue with reference to the value of the land sought to be taken he should be accorded the right to meet the condemning authority upon an equal footing without loss to himself.

Again, in Jacksonville Expressway Authority v. Henry DuPree Co., (Fla.) 108 So. 2d 28, we allowed the moving costs occasioned the condemnee by virtue of the eminent domain proceeding. In that case we said:

> "We feel our constitutional provision for full compensation requires that the courts determine the

value of the property by taking into account all facts and circumstances which bear a *reasonable relationship to the loss occasioned the owner* by virtue of the taking of his property under the right of eminent domain." (Italics supplied.)

In Brigham, we adopted as our own the language of the Circuit Judge who wrote:

> "Full compensation is guaranteed by the Constitution to those whose property is divested from them by eminent domain. The theory and purpose of that guaranty is that the owner shall be made whole so far as possible and practicable."

We do not recede from Brigham or DuPree, but we do feel that in those cases we probably went the last mile, so to speak.

We are of the opinion, as was the learned circuit judge, that the reasoning of the United States Supreme Court in Chicago, Burlington & Quincy Railroad Co. v. Chicago, supra, is as sound and logical today as it was when it was written. It is true now as then that: "The expenses that will be incurred by the railroad company in erecting gates, planking the crossing, and maintaining flagmen, in order that its road may be safely operated—if all that should be required—necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken by the company into account when it accepted the privileges and franchises granted by the State. Such expenses must be regarded as incidental

to the exercise of the police powers of the State." We think that the expenses which the railroad might be put to in grading and paving and maintaining the crossing and the costs of installation of automatic crossing protection devices is a matter which the company should have taken "into account when it accepted the privileges and franchises granted by this State," and that such expenses are the result of the exercise of the police powers of the state and do not, under all the facts and circumstances, "bear a reasonable relationship to the loss occasioned the owner by virtue of the taking of [its] property under the right of eminent domain."

The able circuit judge said:

> "This Court is of the opinion that the Constitution of the State of Florida requires only that the railroad be compensated for the easement taken and that any additional expense of the railroad in the grade crossing or in providing automatic protection devices is a cost of railroading and not a loss due to the taking."

We agree.

Everyone knows, as appellant contends, that there is more vehicular traffic of various types today than there was Circa 1897; that there are more people in this State than there were at the end of the Nineteenth Century, and that there has been a tremendous upswing generally in Florida's economy. It appears logical and reasonable to assume that there has also been a great increase in the revenue of the appellant Railway. Forgetting this assumption,

the facts above stated do not justify or support appellant's argument that the decision of the United States Supreme Court in Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 U. S. 226, is outmoded and should not be applied under present day conditions. This is so because the theory underlying the subject decision of the United States Supreme Court, which theory was adopted by the trial judge in this case and approved herein by this Court, is that these alleged special damages are expenses which "must be regarded as incidental to the exercise of the police powers of the State" and do not amount to "a loss due to the taking."

In connection with Appellant's Point No. 4, we have decided to quote from and adopt as our own the major portion of the Order entered by the trial judge which demonstrates that he gave a great deal of study and careful consideration to this point. We quote from said Order as follows:

> "The Petitioner, Martin County, brought this condemnation suit against the Defendant railroad, F. E. C. Ry. and its mortgagees, to acquire a public easement fifty feet in width to locate a public county road over the railroad's tracks. The railroad (and its mortgagees for whom its counsel also appeared) filed a lengthy Answer to the Petition which in substance raised three defenses to the suit which were litigated at the trial: (1) bad faith and gross abuse of discretion by the Board of County Commissioners in adopting the resolution establishing the crossing and authorizing the suit to acquire it; (2) no public county road was established abutting the crossing on both sides; and (3) such an easement

> will be an undue and unlawful burden upon intra— and interstate commerce by common carrier railroad."

In its brief following trial the railroad argued only the first defense and from statements made at the argument may have abandoned the second defense. Notwithstanding this ambiguity, however, the Court is of the opinion that the county affirmatively proved its establishment of a public county road abutting the proposed easement on both sides and the railroad neither met the county's proof nor proved otherwise. Further, as to the third defense the Court is of the opinion that the evidence fails to show any undue or unlawful burden upon intra-or interstate commerce by the establishment of the proposed crossing. These second and third defenses will not be discussed further.

Although nothing in the Petition indicates that the easement sought is to establish the crossing at grade level, both parties have litigated the matter upon the assumption that the crossing would be at grade and the Court will so consider it in view of this assumption and of the railroad's repeated statement to the Court that it would have no objection to the county road going overhead.

The real meat of this case, which has required more than one year and over six hundred pages of testimony to resolve, is the basic question of whether the Martin County Board of Commissioners acted in bad faith or with gross abuse of discretion in resolving to establish this crossing. At the opening of the trial the railroad conceded that the burden of proof upon these matters rested upon it and it is with such duty in mind that the Court will consider the case.

Appendix B
Opinion of the Supreme Court of Florida—
January 20, 1965

At the outset it is best to make clear what the Court can*not* do. It can*not* determine whether the crossing should be established. That is a power of the Board of County Commissioners acting in good faith and without gross abuse of discretion. The Court cannot determine whether such a crossing will be dangerous. A circuit court has no authority to prohibit dangerous railroad crossings per se. How this Judge would have voted had he been a member of the Board of County Commissioners is not controlling because the decision to be made by that body is not the same as the decision to be made by this Court.

The question which this Court must determine is whether the Board of County Commissioners acted in bad faith or with gross abuse of discretion. In reaching this decision the Court may consider whether the crossing is dangerous, along with all of the other factors that go into the county's decision, but the Court may not substitute its judgment for that of the Commissioners.

The Court will consider separately the two major contentions of bad faith and gross abuse of discretion:

I. Bad Faith

At the trial, the Chairman of the Board of County Commissioners of Martin County appeared and testified with regard to the actions of the County Commissioners prior to adopting the resolution establishing the grade crossing and with regard to the reasoning of the Board of County Commissioners in so acting. Upon cross examination, the railroad brought out that the Chairman, Mr. Frank Wacha, is in private life a certified public ac-

countant who has as one of his clients Radio Station WSTU. While the corporation owning this radio station is not a party to this cause, it is no secret that the crossing will be of great benefit to the radio station and that the closing of the former private crossing at this location caused considerable detriment to the radio station. When Mr. Wacha was questioned regarding the ownership of property by the radio station in the area of the crossing, he asserted the privilege granted by statute to certified public accountants not to disclose the business of a client without the written consent of that client.

The railroad makes much to do about this assertion of privilege and draws numerous inferences from it including the inference that Mr. Wacha may have a property interest in the radio station or may have acted improperly as a County Commissioner to benefit this radio station. However, the railroad had ample opportunity to produce records of the Office of the Secretary of State of Florida concerning the corporation owning the radio station, to depose the officers of the radio station, and to subpoena the corporate books including the stock books of the station. In addition, the president and general manager of the radio station actually appeared upon the witness stand and was subjected to cross examination by the railroad. No questions along these lines were asked of this witness. In fact, the railroad did not even ask Mr. Wacha whether he owned an interest in the radio station, which question certainly would not have been a matter of privilege. With regard to the inference that Mr. Wacha may have acted improperly as a County Commissioner, there is no evidence whatsoever to rebut the presumption that an elected official conducted his office

in a proper manner. In any event, Mr. Wacha was only one of five county commissioners and there is no showing that his vote was determinative of the action taken by the board. Accordingly, this Court finds that no evidence has been presented to show that Mr. Wacha personally acted improperly in this matter.

While upon the witness stand, the Chairman of the Board of County Commissioners testified that the Board's action was taken because an investigation by them discloses that this particular area was developing rapidly, that it was a desirable area for development, that expensive homes had been constructed and future plans called for more construction in the area, that a through road connecting the established portion of Alice Avenue to the site of the former private crossing at the radio station was a part of the long range planning of the county, that the radio station performed a fine public service for Martin County and that it was important that access be provided to the station so that this service could be rendered, that the former private crossing had been in existence for many years without any indication that it was a private crossing, and that the County owned public road-right-of-way on both sides of the crossing. With regard to the matter of safety, the commissioners compared the proposed crossing with other crossings in the county which they considered more dangerous; the commissioners actually examined the proposed crossing and put their cars on both sides of it to examine the sight distance; they considered the history of safety at the former private crossing; they determined that a crossing was needed for the purpose of getting fire fighting equipment into the area rapidly (particularly in view of a

history of fires in this area along the railroad track) and, in general, the crossing was believed by the board to be for the betterment and for the future growth of Martin County. These views of the Chairman were corroborated by the certified copies of the minutes of two county commission meetings admitted in evidence as Petitioner's Exhibits 4 & 5.

Mr. Wacha testified further that the Board of County Commissioners consulted with their County Engineer, a Mr. A. V. Shelton, who had formerly been a long time employee of the State Road Department in charge of specifications and plans and of the training course for that department. Unfortunately, this engineer died several months prior to the trial of this case and so his testimony was unavailable. The board relied upon this professional engineer for advice in the engineering problems concerning the crossing.

As further evidence of their good faith in enacting the resolution establishing the proposed crossing, the Board of County Commissioners, prior to the enactment of that resolution, granted a special hearing and meeting at which the railroad appeared and presented its views. The Senior General Attorney for the railroad, Mr. John B. L'Engle, one of the attorneys who conducted the trial of this case for the railroad, appeared at this hearing before the Board of County Commissioners on behalf of the railroad.

From the foregoing, the Court concludes that the railroad did not meet the burden of proof to establish that the action of the Board of County Commissioners was in bad faith. In this regard, it should be noted that the Court admitted most of the testimony upon this issue, and the

exhibits pertaining to the issue, for the sole purpose of determining whether the Board of County Commissioners acted in bad faith or in gross abuse of discretion and not for the purpose of proving the truth of the county's arguments concerning the safety of the proposed crossing. The Court recognizes that most of this evidence would be inadmissable to prove the question of safety. However, the fact that the Board of County Commissioners did personally investigate the matter, did consult with a professional engineer, did conduct a special meeting for the purpose of hearing the railroad's views, and did state such reasons for their action in adopting the resolution establishing the proposed crossing, is admissable evidence upon the issues of bad faith and gross abuse of discretion.

II. Gross Abuse of Discretion

Basic to the resolution of this issue is a recognition that two opposing philosophies are involved in this matter. The railroad is naturally and understandably concerned primarily with the economical and safe operation of the railroad. The elected commissioners of Martin County are naturally and understandably primarily concerned with the development of the area, the convenience of the public, and the safety of the crossing. Every grade crossing is a detriment to the railroad's aims. Every foot of railroad track which blocks movement, like a wall, is a detriment to the public convenience. The four rails of the main line of the railroad extending over 400 miles from north to south in this State are a barricade to the movement of the public

except at those locations where roads go under, over, or cross at grade level. The fewer the grade crossings, the better the operation of the railroad. The more the crossings, the greater the convenience of the public. While viaducts and tunnels solve the problem in theory, their cost is so great that they cannot solve the problem in practice. No matter how desirable it might be, from an economical standpoint all grade crossings cannot presently be eliminated. Each philosophy is understandable and reasonable. Each philosophy is interested in safety. Unfortunately opinions differ as to the safety of the proposed crossing.

It is with regret that the Court observes that this case was not litigated in an atmosphere of good will. The railroad seeing this as a test case ultimately determining a precedent which will result in savings or expense many times the value of the easement being sought, has thrown the full weight of its organization into the controversy. The Board of County Commissioners, feeling that the authority of a county of this State has been slighted, has responded with an equal determination to see their official decision carried out. With all due respect to the honor and integrity of the men involved, a personality clash is evident between one of the principals on each side of the controversy.

In this situation, if the Court were sitting in judgment of the grade crossing problem for the entire length of the railroad, through the process of bargain and compromise each side probably could be persuaded to give a little and an equitable result could be obtained. However, that is not the case here as only one grade crossing is at issue and this Court must decide the fate of that single crossing.

Appendix B
Opinion of the Supreme Court of Florida—
January 20, 1965

The evidence discloses beyond a doubt that to railroad men all grade crossings are dangerous. Each witness presented by the railroad conceded this point either flatly or in principle. However, since it is obvious in this stage of history that all grade crossings cannot be eliminated, the inherent danger of grade crossings per se cannot be determinative of the issue here.

The railroad presented much expert testimony upon sight distances with relation to time, that is the length of time a motorist at the crossing would have from the time he first saw a train approaching to decide whether to cross and to complete the crossing if begun. The railroad's expert witness demonstrated that under existing speed limitations the sight distance time is dangerously inadequate. In fact, the words 'critical dangerous crossing' were frequently used. Opposed to this, however, is evidence that the former private crossing was in use for many years without the occurrence of a single accident to the knowledge of the witnesses familiar with the area. The railroad, which might be expected to have best knowledge of this matter, presented no evidence of any such accident.

In addition, it is readily conceded that as the speed of the train is reduced, the time available for decision and crossing is increased. If this proposed crossing were located in the middle of a lengthy stretch of straight track with no speed limitations in the vicinity, the requirement that trains slow down for the crossing only to speed up again would be more onerous than in the instant case. However, within approximately 4,000 feet from the proposed crossing is a switch to a single track for the St. Lucie River bridge. The railroad's own speed limit across this single

track is 20 miles per hour. In response to a question from the Court the railroad's witness, Robert F. Stack, who is railroad Foreman of Engines and Trainmaster and who actually pulled the throttle on freight and passenger trains in this area for over seven years, stated that the maximum loss of time from reducing the speed of trains to 30 miles per hour at the proposed crossing would be two minutes. This maximum would be applicable only to south bound trains as north bound trains would be limited by the length of the train in that the 20 mile per hour existing speed limit at the single track switch would be applicable until the last car had cleared the switch and with the longer trains the engine might already be at the proposed crossing before this occurred.

Whether the reduction of train speed or the increase of sight distance at a crossing affects safety appears to be disputable. The railroad has presented statistics upon the subject but at the same time its own experts have stated that one cannot rate a particular crossing. It has been argued that on the one hand a motorist at a blind crossing will disregard signal devices as he cannot see the train approaching, while on the other hand it has been argued that a motorist at a crossing with visibility sufficient to see a train far off in the distance will disregard such signal devices because of his own judgment that he can beat the train to the crossing. Statistics produced by the railroad show that the use of automatic protection devices does not eliminate the accident problem at grade crossings. However, the railroad's witnesses also testified that these automatic devices could be set so as to give the 30 second warning advocated by its own experts upon sight distance time. Other evidence of the railroad discloses that motorists over

the 26 month period preceding the trial broke an average of 14 gates per month by driving into them, and over the latter nine months of this period the average was 16 per month showing an increase in this activity. While this demonstrates that even automatic gates do not prevent grade crossing accidents it also appears to the Court that a crossing cannot be denied in order to protect a motorist from his own folly in crashing through such gates.

All of this discloses that there is no clear conclusion regarding the safety or danger of the proposed crossing. Fortunately the Court is not required to decide this point but must only decide whether the railroad has carried the burden of proof of showing that the Board of County Commissioners acted with gross abuse of discretion in resolving to establish a public grade crossing at this point. The legislature has given the decision regarding the establishment of such crossing to the elected representatives of the people and not to the officers of the railroad. In this case these representatives of the public have determined that it is in the best interest of the public for this crossing to be established and in view of the evidence presented to this Court there was no gross abuse of discretion in reaching this determination. In deciding that in this particular case the public convenience must prevail over the railroad operation, the Board of Commissioners has, in their proper discretion, determined that the march of progress in Martin County cannot be slowed to that pace exhibited by railroads over the last 50 years."

We find upon careful consideration of the briefs and after having heard arguments of counsel that there is no

merit to appellant's Point No. 5, nor to appellant's Point No. 6.

As we have previously noted, this Court in Dade County v. Brigham, (Fla.) 47 So. 2d 602, approved the allowance in the judgment in an eminent domain proceeding of reasonable fees paid by the condemnee to expert witnesses who testified to the value of the land to be taken. Under Point No. 7, we are faced with an entirely different question in this case. Melvin A. Connor did not testify as an expert witness with reference to the value of the easement sought to be taken, but only in connection with the affirmative defenses of the appellant.

We hold the view that the fees of witnesses who testify in support of affirmative defenses as did Mr. Connor should be assessed as costs exactly as costs are assessed in all other civil actions and should not be included in the judgment entered pursuant to the verdict of the jury.

We do not find, as suggested by Point No. 8, any error in the refusal of the trial judge to tax as part of the costs the charges for copies of the transcripts of testimony and for a copy of the deposition used by Appellant Railway.

With reference to the allowance of $6,000.00 attorney fees for appellant's attorneys, we do not discern an abuse of sound judicial discretion. As is contended by appellant in Point No. 9, it is true that the only testimony with reference to reasonable attorney fees was in one instance $9,000.00, and in another $10,000.00. Although testimony with reference to reasonable attorney fees may and in most cases should be heard and considered it is not binding upon the court particularly in a case wherein the judge who fixes the fees presided throughout the entire proceeding in the nisi

prius court. He is usually in a better position than are the lawyers who testify as expert witnesses to know the amount of work necessarily done and the complexities of the legal problems involved. We find no reason to disturb the somewhat liberal allowance of $6,000.00 as and for attorney fees. Indeed, had it not been for the affirmative defenses unsuccessfully urged by the appellant this suit would have been an ordinary and usual every day eminent domain proceeding. It must be remembered, however, that the appellant had the right to challenge the assertion of a public need for the easement sought to be condemned and also the right to set up affirmative defenses. No court has declared such defenses to be frivolous, although the Circuit Court and this Court found them to be devoid of merit.

The judgment from which this appeal was prosecuted is affirmed except the portion thereof which allowed expert witness fees to those witnesses who testified only in support of appellant's affirmative defenses and who did not testify with reference to the value of the easement sought to be taken.

Affirmed in part and reversed in part.

DREW, *C. J.*, ROBERTS, THORNAL, O'CONNELL and ERVIN, *JJ.*, concur

THOMAS, *J.*, dissents because the Court is without jurisdiction

Appendix B

OPINION AND ORDER OF THE FLORIDA CIRCUIT COURT STRIKING PORTIONS OF PETITIONER'S ANSWER— NOVEMBER 30, 1962

[CAPTION OMITTED]

This cause came on to be heard November 23, 1962, upon the Motion to Strike certain paragraphs of the Answer to the Petition; and the Court having heard the argument of counsel and having considered the authorities submitted by counsel; and the Court having ruled on paragraphs 1 and 3 of the Motion previously in its Order of November 27, 1962, denying said paragraphs of the Motion; and it appearing that,

The second paragraph of the Motion to Strike seeks to eliminate from the Answer of the Defendant Railroad its claim for damages other than the mere taking of the easement. In essence, this Court is called upon to determine the following question: "When a county condemns a right-of-way across a railroad for public road purposes, are the costs of automatic crossing protection devices (lights, bells, & gates), grading, preparation of base, paving of the crossing, and annual maintenance of the devices and the grade crossing, includable in the compensation to be awarded by the jury?"

This question appears to be one of first impression in the State of Florida. It has arisen in other states a sufficient number of times for both of the general law encyclopedias to reach general conclusions upon the matter. It appears that the majority rule is that when a highway is laid out across a railroad, the railroad company may be compelled to construct and maintain the crossing at its own expense, to include gates, signs, cattle guards, other safe-

guards against injury to persons or property, planking between the rails, and other improvements required to make the crossing convenient for travel upon the highway. 18 Am. Jur., Eminent Domain § 287; 29 C. J. S., Eminent Domain § 147b. The same authorities, however, recognize that in several states the railroad company is entitled to recover such expenses.

The Supreme Court of the United States in *Chicago B & Q R. R.* v. *Chicago,* 166 U. S. 226 (1897), held that the Constitution of the United States did not require payment to a railroad in eminent domain proceedings for the expense of constructing gates, a tower for operating the gates, planking the crossing, filling between the rails, putting in an extra rail, and annual expense of depreciation, maintenance, and employment of gatemen. The Court, at page 255, stated:

> "The expenses that will be incurred by the railroad company in erecting gates, planking the crossing, and maintaining flagmen, in order that its road may be safely operated,—if all that should be required,—necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken by the company into account when it accepted the privileges and franchises granted by this state. Such expenses must be regarded as incidental to the exercise of the police powers of the state."

The Defendant Railroad in the instant case argues, however, that a general rule applicable in other states should not be followed in the State of Florida in view of the fact

that our constitutional provisions pertaining to compensation to land-owners upon condemnation of property are broader and more generous to the landowner than in other states. In support of this proposition the railroad has cited the case of *Jacksonville Expressway Authority* v. *Henry G. DuPree Company,* 108 So. 2d 289 (1958), wherein the Supreme Court of Florida rejected the rule prevailing in other jurisdictions which disallows moving costs and, in view of the Florida constitutional provisions requiring that the owner be made whole, adopted a rule allowing such moving costs to be recovered.

It is obvious that the establishment of this grade crossing by the county will result in additional expense to the railroad in grading the crossing, in establishing safety devices, and in maintaining both the crossing and the devices. The problem, however, is whether this additional expense is a part of the "taking" for which compensation must be paid or whether it is incidental to the operation of the railroad and must be considered only as the general additional cost of doing business in a growing area. The reasons given by the various courts which deny such damages to the railroads vary. Some courts hold that these expenses are not recoverable because they are the result of the exercise of the police power of the state rather than the result of the taking of the right-of-way easement. Other courts hold that the reserve power of the state to alter, amend, or appeal the charter of the railroad corporation is applicable. Still other courts hold that there is an implied condition to the initial grant of the charter for the railroad since all parties must be aware that highways will subsequently be built and must necessarily cross the railroad. 18 Am. Jur.,

Appendix B
Opinion and Order of the Florida Circuit Court Striking Portions of Petitioner's Answer—November 30, 1962

Eminent Domain § 287. The Supreme Court of the United States in the *Chicago B & Q R.R.* v. *Chicago* case, cited above, stated at page 255:

> What was obtained, and all that was obtained, by the condemnation proceedings for the public was the right to open a street across land within the crossing that was used, and was always likely to be used, for railroad tracks. While the city was bound to make compensation for that which was actually taken, it cannot be required to compensate the defendant for obeying lawful regulations enacted for the safety of the lives and property of the people.

The Courts of this State have been liberal in construing the eminent domain provisions of our State Constitution. They have indicated that the theory and spirit of the constitutional guarantee requires a practical attempt to make the owner whole and that a person who is put to expense through no desire or fault of his own can only be made whole when his reasonable expenses are included in the compensation awarded.

In law, the large railroad corporation should be accorded the same rights as the poor widow whose property is taken. However, the large railroad corporation is entitled to the same rights only insofar as its situation is the same as that of the poor widow. To the extent that the railroad may pass off the additional expense of the crossing onto the consumer (with the concurrence of the rate regulatory bodies) the railroad is in a different situation from the widow. In essence, the real problem here is who shall

bear this cost: the taxpayers of the county establishing the right-of-way over the railroad or the corporate enterprise and its customers whose property, held for profit, is being crossed?

From the allegations in the railroads answer to the petition, which allegations for the purposes of this motion only and not for any other purposes must be assumed to be correct, it appears that the cost of automatic crossing protection devices will exceed $20,000.00, that the establishment of the grade crossing will exceed $2,000.00, that the maintenance of the grade will be aproximately $300.00 per year, and that the maintenance of the automatic crossing protection devices will exceed $800.00 per year. We may also assume from the pleadings on file that the actual value of the easement ifself is, in comparison with these other expenses, relatively small. Assuming also, which point is contested by the railroad and has not been decided by this Court, that there is a necessity for this crossing and that the county has acted in good faith in establishing it, we are faced with the problem whether a county or other public body under such circumstances must pay in excess of $22,000.00 for each grade crossing it establishes. Such a determination would seriously impair the practical right of the county to establish new roads consistent with the growth of the area. On the other hand, the question may also be stated whether a railroad may be required to expend in excess of $22,000.00 for every grade crossing which is forced upon it by a county or other public body and for which it receives only nominal compensation. Such a determination might well increase the cost of railroading to such a point that it could no longer be operated as a private business with a profit incentive.

Appendix B

Opinion and Order of the Florida Circuit Court Striking Portions of Petitioner's Answer—November 30, 1962

The reasons relating to the corporate charter summarized above in American Jurisprudence for the disallowance of such expenses strike this Court as legal fictions or rationalizations of a predetermined conclusion. The problem is not actually one of what did the railroad and what did the State of Florida intend when the railroad's charter was issued in 1896. The problem is who must bear these expenses under our state constitution, the railroad or the public?

This Court is of the opinion that the Constitution of the State of Florida requires only that the railroad be compensated for the easement taken and that any additional expense of the railroad in the grade crossing or in providing automatic protection devices is a cost of railroading and not a loss due to the taking. The State has a right to regulate railroads and under these regulations may require the railroads to expend large sums of money for safety devices unconnected with grade crossings or with any exercise of the power of eminent domain. This Court can see little distinction between a requirement that the railroad establish adequate warning devices at grade crossings and a requirement that a railroad locomotive be equipped with a bell or with an air braking system. It must be recognized that some expenses which result from the establishment of one new grade crossing are not compensable in any event. For example, the railroad has not claimed any damages for expense arising out of the ringing of bells or the sounding of whistles on its locomotives as they approach the proposed crossing. Although it may be assumed that the railroad's locomotives are already equipped with such devices, it could logically be argued that the devices must be operated more frequently than before be-

cause of the additional crossing and thus the depreciation and maintenance of the devices is increased. Although in logic such additional expense could be established, as a practical matter no court or advocate would go so far. Even more remote examples of additional expense to the railroads could be conceived. The point, nevertheless, is that there must be a dividing line between what may be recovered and what may not.

We are involved here with particular expenses only because they relate to a particular taking. This circumstance clouds the real issue which is that in the public interest a railroad must expend money for many safety devices and procedures and to prevent its system of public transportation from interfering with other land, water, and air systems of public transportation. In the Court's opinion the only thing that is taken from the railroad by this condemnation proceeding is the easement of right-of-way, and any additional expense which the railroad incurs arises not out of the taking but out of the operation of the railroad in the public interest.

The railroad has cited to the court a number of cases and authorities to the effect that where the property taken has no real market value, the determination of compensation must depend upon the difference between the value to the railroad of the exclusive use of the property which existed before the taking and the value of the property to the railroad after the easement has been taken and that this determination may include additional expense of operation. In order to avoid any misunderstanding, it is the Court's opinion that the discussion which has preceded this necessarily precludes the railroad from recovering the expenses of the safety devices and grade crossing under any view

of this case and the railroad may not present such expenses to the jury as an element of valuation of the taking.

When a Motion to Strike is granted, the Court normally permits the pleader to amend if he wishes. Under the circumstances of this case it would appear that the issue here being decided by the Court would not be decided differently upon any rephrasing of the portions of the Answer being stricken. However, because counsel may disagree, the Court will grant a short period for amendment after which this Order shall become final. For the foregoing reasons,

IT IS, ORDERED AND ADJUDGED THAT:

1. The Motion to Strike (filed herein by the Petitioner) those portions of paragraph 7 of the Answer of the railroad set forth in the second paragraph of the Motion to Strike be and the same are hereby granted.

2. The Defendant Railroad shall have seven days from the date of this Order within which to amend the stricken portions of its Answer. If no amendment is filed, this Order shall stand as final. If the Defendant Railroad desires to amend and requires additional time, the Court will entertain a written request therefor filed prior to the expiration of the seven day period.

DONE and ORDERED in Chambers, at Stuart, Martin County, Florida, this 30th day of November, 1962.

/s/ C. PFEIFFER TROWBRIDGE
Circuit Judge

[Names of Counsel Omitted]

Appendix B

OPINION AND ORDER OF THE FLORIDA CIRCUIT COURT DENYING PETITIONER'S MOTION FOR REHEARING— FEBRUARY 20, 1963

[CAPTION OMITTED]

This cause came on to be heard January 16, 1963, upon the Motion of the Defendant, Florida East Coast Railway Company, for rehearing of Petitioner's Motion to Strike certain portions of Defendant Railway's Answer and for reconsideration by the Court of its Order dated November 30, 1962, granting Petitioner's Motion to Strike portions of Defendant Railway's Answer; and the Court having heard the argument of counsel for all parties and having considered written briefs submitted to it; it appears that:

The Defendant Railroad contends that the Court erred in its previous order by failing to consider the case of *Nashville C. St. L. Ry.* v. *Walters,* 294 U. S. 405, (1935), as substantially overruling the previous case of *Chicago B. & Q. RR.* v. *Chicago,* 166 U. S. 226 (1897). In the 1935 case, the United States Supreme Court considered a Tennessee statute requiring the railroad there to pay one-half of the expense of separating a grade crossing. Mr. Justice Brandeis, delivering the opinion of the court, pointed out that a change in conditions could make a statute which was valid when enacted invalid at a later date. He further concluded that the relative economic positions of the railroad industry and the motor vehicle transportation system had changed since the enactment of the Tennessee statute and that the imposition of one-half the cost of the grade separation *could* be arbitrary and unreasonable. Accordingly,

the Court returned the case to the Tennessee Supreme Court for its initial determination whether the facts in that case were of such persuasiveness as to have required the state court to hold that the statute and order complained of were arbitrary and unreasonable.

Aside from the fact that the 1935 case does not purport to overrule the 1897 case, there are other distinguishing features which make the 1935 case inapplicable to the instant question. In the 1935 case, the court was concerned with the change of an existing grade crossing to a grade separation. In the instant case we are concerned with the right of the general public to cross the railroad at grade initially. In the 1935 case, the general public already had a means of crossing the railroad and the sole question was whether the railroad must bear the expense of making that crossing more convenient and safer for the motor vehicles upon the road. In the instant case, the general public has no right to cross the railroad and the problem is, if the public is granted a right to cross at grade level who shall bear the expense of the crossing? In one case it is a question of convenience and in the other a question of necessity.

In the 1935 case, the Supreme Court stated (at page 413) "The claim of unconstitutionality rests solely upon the special facts here shown." The court further discussed (at page 424) the location of the particular crossing there involved, the amount of existing traffic at that point, the number of trains passing over that crossing, the safety record of the crossing, and other special facts involved in the crossing. The Supreme Court did not, in fact, con-

clude that the statute was invalid as to that particular crossing but rather remanded the case to the Tennessee Supreme Court which had previously declined to consider the special facts relied upon as showing that the order and statute as applied were arbitrary and unreasonable.

The two Florida decisions cited by the railroad in its brief as adopting the main principles of law in the 1935 case, *W. J. Howey Co.* v. *Williams,* 195 So. 181 (1940), and *Atlantic C. L. RR.* v. *Ivey,* 5 So. 2d 244 (1942), are not in point except insofar as they quote with approval Justice Brandeis's recognition of the change in economic circumstances of railroad and motor vehicle transportation systems.

The remainder of the points of argument cited by the railroad and the cases in support thereof in its brief have been considered by the Court but do not appear to affect the only question for decision as set out in the previous order of this Court dated November 30, 1962. For the foregoing reasons;

IT IS ORDERED AND ADJUDGED THAT the above described Motion of the Defendant, Florida East Coast Railway, for rehearing and reconsideration by the Court of its Order dated November 30, 1962, be and the same is hereby denied.

DONE and ORDERED in Chambers in Stuart, Martin County, Florida, this 20th day of February, 1963.

/s/ C. PFEIFFER TROWBRIDGE
Circuit Judge

[Names of Counsel Omitted]

Appendix B

OPINION AND ORDER OF THE FLORIDA CIRCUIT COURT (ON PETITION AND ANSWER) DIRECTING JURY TRIAL OF ISSUE OF DAMAGES AS LIMITED BY ITS ORDERS—FEBRUARY 20, 1963

[CAPTION OMITTED]

This cause came on to be heard December 5, 6, & 7, 1962, upon all issues in the cause to be tried before the Court without a jury pursuant to the Order of this Court entered herein November 27, 1962; and the Court having considered the testimony and other evidence, the arguments of counsel, and the briefs submitted; it appears that:

The Petitioner, Martin County, brought this condemnation suit against the Defendant railroad, F. E. C. Ry. and its mortgagees, to acquire a public easement fifty feet in width to locate a public county road over the railroad's tracks. The railroad (and its mortgagees for whom its counsel also appeared) filed a lengthy Answer to the Petition which in substance raised three defenses to the suit which were litigated at the trial: (1) bad faith and gross abuse of discretion by the Board of County Commissioners in adopting the resolution establishing the crossing and authorizing the suit to acquire it; (2) no public county road was established abutting the crossing on both sides; and (3) such an easement will be an undue and unlawful burden upon intra-and interstate commerce by common carrier railroad.

In its brief following trial the railroad argued only the first defense and from statements made at the argument may have abandoned the second defense. Notwithstanding this ambiguity, however, the Court is of the opinion that

the county affirmatively approved its establishment of a public county road abutting the proposed easement on both sides and the railroad neither met the county's proof nor proved otherwise. Further, as to the third defense the Court is of the opinion that the evidence fails to show any undue or unlawful burden upon intra-or interstate commerce by the establishment of the proposed crossing. These second and third defenses will not be discussed further.

Although nothing in the Petition indicates that the easement sought is to establish the crossing at grade level, both parties have litigated the matter upon the assumption that the crossing would be at grade and the Court will so consider it in view of this assumption and of the railroad's repeated statement to the Court that it would have no objection to the county road going overhead.

The real meat of this case, which has required more than one year and over six hundred pages of testimony to resolve, is the basic question of whether the Martin County Board of Commissioners acted in bad faith or with gross abuse of discretion in resolving to establish this crossing. At the opening of the trial the railroad conceded that the burden of proof upon these matters rested upon it and it is with such duty in mind that the Court will consider the case.

At the outset it is best to make clear what the Court can*not* do. It can*not* determine whether the crossing should be established. That is a power of the Board of County Commissioners acting in good faith and without gross abuse of discretion. The Court cannot determine whether such a crossing will be dangerous. A circuit court has no authority to prohibit dangerous railroad crossings per

se. How this Judge would have voted had he been a member of the Board of County Commissioners is not controlling because the decision to be made by that body is not the same as the decision to be made by this Court.

The question which this Court must determine is whether the Board of County Commissioners acted in bad faith or with gross abuse of discretion. In reaching this decision the Court may consider whether the crossing is dangerous, along with all of the other factors that go into the county's decision, but the Court may not substitute its judgment for that of the commissioners.

The Court will consider separately the two major contentions of bad faith and gross abuse of discretion:

I. Bad Faith

At the trial, the Chairman of the Board of County Commissioners of Martin County appeared and testified with regard to the actions of the County Commissioners prior to adopting the resolution establishing the grade crossing and with regard to the reasoning of the Board of County Commissioners in so acting. Upon cross examination, the railroad brought out that the Chairman, Mr. Frank Wacha, is in private life a certified public accountant who has as one of his clients Radio Station WSTU. While the corporation owning this radio station is not a party to this cause, it is no secret that the crossing will be of great benefit to the radio station and that the closing of the former private crossing at this location caused considerable detriment to the radio station. When Mr. Wacha was questioned

regarding the ownership of property by the radio station in the area of the crossing, he asserted the privilege granted by statute to certified public accountants not to disclose the business of a client without the written consent of that client.

The railroad makes much to do about the assertion of privilege and draws numerous inferences from it including the inference that Mr. Wacha may have a property interest in the radio station or may have acted improperly as a County Commissioner to benefit this radio station. However, the railroad had ample opportunity to produce records of the Office of the Secretary of State of Florida concerning the corporation owning the radio station, to depose the officers of the radio station, and to subpoena the corporate books including the stock books of the station. In addition, the president and general manager of the radio station actually appeared upon the witness stand and was subjected to cross examination by the railroad. No questions along these lines were asked of this witness. In fact, the railroad did not even ask Mr. Wacha whether he owned an interest in the radio station, which question certainly would not have been a matter of privilege. With regard to the inference that Mr. Wacha may have acted improperly as a County Commissioner, there is no evidence whatsoever to rebut the presumption that an elected official conducted his office in a proper manner. In any event, Mr. Wacha was only one of five county commissioners and there is no showing that his vote was determinative of the action taken by the board. Accordingly, this Court finds that no evidence

has been presented to show that Mr. Wacha personally acted improperly in this matter.

While upon the witness stand, the Chairman of the Board of County Commissioners testified that the Board's action was taken because an investigation by them disclosed that this particular area was developing rapidly, that it was a desirable area for development, that expensive homes had been constructed and future plans called for more construction in the area, that a through road connecting the established portion of Alice Avenue to the site of the former private crossing at the radio station was a part of the long range planning of the county, that the radio station performed a fine public service for Martin County and that it was important that access be provided to the station so that this service could be rendered, that the former private crossing had been in existence for many years without any indication that it was a private crossing, and that the County owned public road-right-of-way on both sides of the crossing. With regard to the matter of safety, the commissioners compared the proposed crossing with other crossings in the county which they considered more dangerous; the commissioners actually examined the proposed crossing and put their cars on both sides of it to examine the sight distance; they considered the history of safety at the former private crossing; they determined that a crossing was needed for the purpose of getting fire fighting equipment into the area rapidly (particularly in view of a history of fires in this area along the railroad track) and, in general, the crossing was believed by the board to be

for the betterment and for the future growth of Martin County. These views of the Chairman were corroborated by the certified copies of the minutes of two county commission meetings admitted in evidence as Petitioner's Exhibits 4 & 5.

Mr. Wacha testified further that the Board of County Commissioners consulted with their County Engineer, a Mr. A. V. Shelton, who had formerly been a long time employee of the State Road Department in charge of specifications and plans and of the training course for that department. Unfortunately, this engineer died several months prior to the trial of this case and so his testimony was unavailable. The board relied upon this professional engineer for advice in the engineering problems concerning the crossing.

As further evidence of their good faith in enacting the resolution establishing the proposed crossing, the Board of County Commissioners, prior to the enactment of that resolution, granted a special hearing and meeting at which the railroad appeared and presented its views. The Senior General Attorney for the railroad, Mr. John B. L'Engle, one of the attorneys who conducted the trial of this case for the railroad, appeared at this hearing before the Board of County Commissioners on behalf of the railroad.

From the foregoing, the Court concludes that the railroad did not meet the burden of proof to establish that the action of the Board of County Commissioners was in bad faith. In this regard, it should be noted that the Court admitted most of the testimony upon this issue, and the

exhibits pertaining to the issue, for the sole purpose of determining whether the Board of County Commissioners acted in bad faith or in gross abuse of discretion and not for the purpose of proving the truth of the county's arguments concerning the safety of the proposed crossing. The Court recognizes that most of this evidence would be inadmissable to prove the question of safety. However, the fact that the Board of County Commissioners did personally investigate the matter, did consult with a professional engineer, did conduct a special meeting for the purpose of hearing the railroad's views, and did state such reasons for their action in adopting the resolution establishing the proposed crossing, is admissable evidence upon the issues of bad faith and gross abuse of discretion.

II. Gross Abuse of Discretion

Basic to the resolution of this issue is a recognition that two opposing philosophies are involved in this matter. The railroad is naturally and understandably concerned primarily with the economical and safe operation of the railroad. The elected commissioners of Martin County are naturally and understandably primarily concerned with the development of the area, the convenience of the public, and the safety of the crossing. Every grade crossing is a detriment to the railroad's aims. Every foot of railroad track which blocks movement, like a wall, is a detriment to the public convenience. The four rails of the main line of the railroad extending over 400 miles from north to south in this State are a barricade to the movement of the public except at

those locations where roads go under, over, or cross at grade level. The fewer the grade crossings, the better the operation of the railroad. The more the crossings, the greater the convenience of the public. While viaducts and tunnels solve the problem in theory, their cost is so great that they cannot solve the problem in practice. No matter how desirable it might be, from an economical standpoint all grade crossings cannot presently be eliminated. Each philosophy is understandable and reasonable. Each philosophy is interested in safety. Unfortunately opinions differ as to the safety of the proposed crossing.

It is with regret that the Court observes that this case was not litigated in an atmosphere of good will. The railroad, seeing this as a test case ultimately determining a precedent which will result in savings or expense many times the value of the easement being sought, has thrown the full weight of its organization into the controversy. The Board of County Commissioners, feeling that the authority of a county of this State has been slighted, has responded with an equal determination to see their official decision carried out. With all due respect to the honor and integrity of the men involved, a personality clash is evident between one of the principals on each side of the controversy.

In this situation, if the Court were sitting in judgment of the grade crossing problem for the entire length of the railroad, through the process of bargain and compromise each side probably could be persuaded to give a little and an equitable result could be obtained. However, that is not the case here as only one grade crossing is at issue and this Court must decide the fate of that single crossing.

Appendix B

Opinion and Order of the Florida Circuit Court (on Petition and Answer) Directing Jury Trial of Issue of Damages as Limited by Its Orders—February 20, 1963

The evidence discloses beyond a doubt that to railroad men all grade crossings are dangerous. Each witness presented by the railroad conceded this point either flatly or in principle. However, since it is obvious in this stage of history that all grade crossings cannot be eliminated, the inherent danger of grade crossings per se cannot be determinative of the issue here.

The railroad presented much expert testimony upon sight distances with relation to time, that is the length of time a motorist at the crossing would have from the time he first saw a train approaching to decide whether to cross and to complete the crossing if begun. The railroad's expert witnesses demonstrated that under existing speed limitations the sight distance time is dangerously inadequate. In fact, the words "critical dangerous crossing" were frequently used. Opposed to this, however, is evidence that the former private crossing was in use for many years without the occurrence of a single accident to the knowledge of the witnesses familiar with the area. The railroad, which might be expected to have best knowledge of this matter, presented no evidence of any such accident.

In addition, it is readily conceded that as the speed of the train is reduced, the time available for decision and crossing is increased. If this proposed crossing were located in the middle of a lengthy stretch of straight track with no speed limitations in the vicinity, the requirement that trains slow down for the crossing only to speed up again would be more onerous than in the instant case. However, within approximately 4,000 feet from the proposed crossing is a

switch to a single track for the St. Lucie River bridge. The railroad's own speed limit across this single track is 20 miles per hour. In response to a question from the Court the railroad's witness, Robert F. Stack, who is railroad Foreman of Engines and Trainmaster and who actually pulled the throttle on freight and passenger trains in this area for over seven years, stated that the maximum loss of time from reducing the speed of trains to 30 miles per hour at the proposed crossing would be two minutes. This maximum would be applicable only to south bound trains as north bound trains would be limited by the length of the train in that the 20 mile per hour existing speed limit at the single track switch would be applicable until the last car had cleared the switch and with the longer trains the engine might already be at the proposed crossing before this occurred.

Whether the reduction of train speed or the increase of sight distance at a crossing affects safety appears to be disputable. The railroad has presented statistics upon the subject but at the same time its own experts have stated that one cannot rate a particular crossing. It has been argued that on the one hand a motorist at a blind crossing will disregard signal devices as he cannot see the train approaching, while on the other hand it has been argued that a motorist at a crossing with visibility sufficient to see a train far off in the distance will disregard such signal devices because of his own judgment that he can beat the train to the crossing. Statistics produced by the railroad show that the use of automatic protection devices does not eliminate the accident problem at grade crossing. However, the

Appendix B
Opinion and Order of the Florida Circuit Court (on Petition and Answer) Directing Jury Trial of Issue of Damages as Limited by Its Orders—February 20, 1963

railroad's witnesses also testified that these automatic devices could be set so as to give the 30 second warning advocated by its own experts upon sight distance time. Other evidence of the railroad discloses that motorists over the 26 month period preceding the trial broke an average of 14 gates per month by driving into them, and over the latter nine months of this period the average was 16 per month showing an increase in this activity. While this demonstrates that even automatic gates do not prevent grade crossing accidents it also appears to the Court that a crossing cannot be denied in order to protect a motorist from his own folly in crashing through such gates.

All of this discloses that there is no clear conclusion regarding the safety or danger of the proposed crossing. Fortunately the Court is not required to decide this point but must only decide whether the railroad has carried the burden of proof of showing that the Board of County Commissioners acted with gross abuse of discretion in resolving to establish a public grade crossing at this point. The legislature has given the decision regarding the establishment of such crossing to the elected representatives of the people and not to the officers of the railroad. In this case these representatives of the public have determined that it is in the best interest of the public for this crossing to be established and in view of the evidence presented to this Court there was no gross abuse of discretion in reaching this determination. In deciding that in this particular case the public convenience must prevail over the railroad operation, the Board of Commissioners has, in their proper

Appendix B
Opinion and Order of the Florida Circuit Court (on Petition and Answer) Directing Jury Trial of Issue of Damages as Limited by Its Orders—February 20, 1963

discretion, determined that the march of progress in Martin County cannot be slowed to that pace exhibited by railroads over the last 50 years. For the foregoing reasons:

IT IS ORDERED AND ADJUDGED THAT:

1. Upon the Petition and Answer filed herein the Court finds for the Petitioner in that it has established its right to proceed with the condemnation of the easement sought.

2. All matters in controversy between the Petitioner and the Defendants, save for the amount of damages for the taking, are hereby decided in favor of the Petitioner and against the Defendants.

3. This cause shall proceed to trial by jury upon the issue of damage to the Defendants in accordance with the limitations set forth in the Order of this Court dated November 30, 1962, and the Order denying Motion for Rehearing of that Order entered this same date.

DONE and ORDERED in Chambers in Stuart, Martin County, Florida, this 20th day of February, 1963.

/s/ C. PFEIFFER TROWBRIDGE
CIRCUIT JUDGE

[Names of Counsel Omitted]

Appendix B

MANDATE FROM SUPREME COURT OF FLORIDA

To the Honorable, the Judges of
the Circuit Court for the Ninth
Judicial Circuit of Florida.

Greeting:

WHEREAS, Lately in the Circuit Court of Ninth Judicial Circuit, in and for the County of Martin in a cause wherein

MARTIN COUNTY, a Political Subdivision of the State of Florida, was petitioner

and

THE FLORIDA EAST COAST RAILWAY COMPANY, a Florida corporation, was defendant

(CIRCUIT COURT # 1519—AT LAW)

the Judgment of said Circuit Court was rendered June 25, 1963 as by the inspection of the transcript of the record of the said Circuit Court which was brought into the Supreme Court of the State of Florida, by virtue of an appeal agreeably to the laws of said State in such case made and provided, fully and at large appears:

AND WHEREAS, at the January Term of said Supreme Court holden at Tallahassee, A. D. 1965, the said cause came on to be heard before the said Supreme Court on the said transcript of the record and was argued by counsel; in consideration whereof, on the 20th day of January A. D.

1965 the said Supreme Court rendered its opinion and judgment in said cause as per copy thereof hereto attached and made a part hereof.

In Consideration Whereof, It Is Ordered by the Court that the costs in this behalf expended herein taxed at Twenty-Five Dollars, be taxed equally between the Appellant and Appellees and that all costs shall be taxed in the court in which the appeal was entered, therefore,

YOU ARE HEREBY COMMANDED, That such further proceedings be had in said cause as according to right, justice, the judgment of said Supreme Court, and the laws of the State of Florida, ought to be had, the said Judgment of the Circuit Court notwithstanding.

WITNESS, The Honorable E. HARRIS DREW
Chief Justice of said Supreme Court, and the seal of said Court at Tallahassee, this 15th day of January 1965.

(SEAL) /s/ SID J. WHITE
Clerk Supreme Court
of Florida.

[The attached copy of opinion, not reproduced, is the same as that appearing at R. 1381-1399, printed *supra*, pp. B-1—B-23.]

APPENDIX C

PORTIONS OF RECORD IN WHICH CONSTITUTIONAL ISSUES WERE RAISED

Railway's Answer to Martin County's Petition for Condemnation, Filed October 17, 1962 (R. 96-108):

"... That to permit Petitioner [Martin County] to acquire by these proceedings an easement for a crossing at grade of a county public road upon and across Defendant's lands described in paragraph SECOND of Petition will constitute ... an undue and unlawful burden upon and interference with the Intrastate Commerce and the Interstate Commerce by common carrier railroad in which this Defendant is engaged by means of its aforesaid lines of railroad and right of way therefor, ..." (R. 99-100)

Motion for Rehearing of Motion to Strike Certain Portions of Petitioner's Answer and for Reconsideration by the Court of its Order dated November 30, 1962 Granting Said Motion, Filed December 14, 1962 (R. 292-296):

"3. The imposition upon Defendant, Florida East Coast Railway Company, of the entire cost of opening and maintenance of the grade crossing and cost of installation, operation and maintenance of automatic crossing protection devices by denying it the right of recovery of such expenses from the Petitioner will under the present conditions of railroad and automobile traffic, constitute a violation and impairment of the rights of Defendant, Railway Company, under ... Section 1 of Amendment XIV of the Constitution of the United States.

"4. The imposition of Defendant, Florida East Coast Railway Company, of the entire cost of opening and maintenance of the grade crossing and cost of installation, operation and maintenance of automatic crossing protection devices by denying it the right of recovery of such expenses ... will be violation, impairment and depreciation

of the constitutional rights of Defendant, Florida East Coast Railway Company, under . . . Amendment V and Section 1 of Amendment XIV of Constitution of the United States." (R. 295)

Petitioner's Motion for New Trial, Filed June 14, 1963 (R. 1034-1038):

"21. Said Order or Verdict deprives Defendant Railway of its property 'without due process of law' contrary to the provisions of Amendment V and contrary to the provisions of Section 1 of Amendment XIV of the Constitution of the United States.

"22. Said Order or Verdict constitutes an unlawful attempt to take the 'private property' of Defendant Railway, 'for public use', without just compensation, contrary to the provisions of Amendment V of Constitution of the United States.

"23. Said Order or Verdict constitutes an unlawful attempt to 'deny to' Defendant Railway within the jurisdiction of the State of Florida, 'the equal protection of the laws' contrary to the provisions of Section 1 of Amendment XVI [sic] of the Constitution of the United States." (R. 1037)

Petitioner's Assignment of Errors, Filed June 25, 1963 (R. 1275-1280):

"22. The Court erred in entering its Order of February 20, 1963, 'On Petition and Answer' in that the same being contrary to the weight and preponderance of the competent evidence it constituted an unlawful deprivation of Defendant Railway Company of its property contrary to the provi-

sions of Amendment V and contrary to the provisions of Section 1 of Amendment XIV of Constitution of the United States.

"23. The Court erred in entering its Order of November 30, 1962, insofar as the same grants 'Motion of Petition Martin County's * * * To Strike Portions of Defendant's Answer' namely, portions of Paragraph 7 of said Answer of Defendant, Florida East Coast Railway Company, and also erred in the entry of February 20, 1963, of the 'Order Denying Motion for Rehearing,' of 'Motion of Petitioner Martin County * * * To Strike Portions of Answer of Defendant, to-wit: Paragraph 7 of Defendant Railway Company's Answer in that each of said Orders deprived the Defendant Railway Company of its property 'without due process of law' . . . contrary to Amendment V and contrary to Section 1 of Amendment XIV respectively, of Constitution of the United States." (R. 1278-1279)

Petition for Rehearing in the Supreme Court of Florida, Filed February 19, 1965 (R. 1401-1409):

"This Court overlooked and failed to consider that the Trial Court by striking those portions of this Petitioner's Answer alleging special damages as recited above and based on the police power of the State ruled as a matter of law that under no circumstances regardless of the change of conditions could the Petitioner recover such damages; and this Court further overlooked and failed to consider that such a ruling by the Trial Court based solely on the police power was arbitrary and unreasonable and absolutely foreclosed this Petitioner's right ever to have the change of conditions that might require the allowance of compensa-

tion for said items of special damages judicially determined thereby depriving this Petitioner of due process of law and equal protection of law under . . . the United States Constitution.

"3. This Court in rendering its decision in this cause regarding Points 3 and 4, primarily adopted the opinion of the Trial Court which held, without discussion, that the establishment of the railroad grade crossing here involved and the consequent imposition of the entire cost of installing, operating and maintaining the safety devices necessary did not place any undue or unlawful burden on intra and interstate commerce contrary to the Constitution of Florida or the Constitution of the United States. In so doing, this Court overlooked or failed to consider the evidence of the record showing the effect the instant decision will have on the Appellant in areas other than the location of this particular railroad grade crossing along the entire remaining four hundred miles of the Appellant's rail lines in the State of Florida.

In adopting the opinion of the Trial Court this Court overlooked or failed to consider the fact that the Trial Court refused to consider the effect of this decision with respect to the obligation it places on Appellant in every County in Florida throughout which its lines extend, but specifically confined its determination to "the fate of that single crossing," thus refusing and failing to consider the wealth of evidence produced by the Appellant demonstrating the change of conditions since the advent of the motor vehicle, especially the motorized common carrier, and the corresponding increase in the burden this development imposes on railroads in intra and interstate commerce." (R. 1406-1407)

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 28 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 335

FLORIDA EAST COAST RAILWAY
a Florida corporation,

Petitioner,

v.

MARTIN COUNTY, a Political Subdivision
of the State of Florida

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

DEAN TOOKER,

Counsel for Respondent

P. O. Drawer 1016

Stuart, Florida 33494

INDEX

	PAGE
Jurisdiction	1
Questions Presented	2
Constitutional Provisions Involved	2
Statement of the Case	2
ARGUMENT	
I. This Court is without Jurisdiction	2
II. A substantial Federal Question has not been Raised	4
III. Decision Below is in Accord With Applicable Decisions of this Court	7
CONCLUSION	13

CITATIONS

	PAGE
CASES:	
Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405	2, 9, 11
Cramp v. Board of Public Instruction, 368 U.S. 278	2, 3
Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226	7, 8
Erie Railroad Co. v. Board of Public Utility Comrs., 254 U.S. 394	9, 10
Atchison, Topeka & S. F. R. Co. v. Public Util. Com., 346 U.S. 346	10, 11
Goldblatt v. Town of Hempstead, 369 U.S. 590	12
Mugler v. Kansas, 123 U.S. 623	12
CONSTITUTION OF FLORIDA	
Declaration of Rights, Section 12	3
Article 16, Section 29	3
STATUTES:	
28 U.S.C. 1257(3) (1958)	1
Section 351.03, Florida Statutes	4, 5, 7
Section 317.455, Florida Statutes	5, 7
Section 357.01, Florida Statutes	6, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

FLORIDA EAST COAST RAILWAY
a Florida corporation,

Petitioner,

v.

MARTIN COUNTY, a Political Subdivision
of the State of Florida

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent prays that the writ of certiorari prayed for by petitioner be denied.

JURISDICTION

Respondent respectfully submits that this Court is without jurisdiction because the judgment of the Supreme Court of Florida rests upon a state or non-federal ground, independent of any federal ground, adequate to support it; and respondent further submits that the jurisdiction of this Court is not invoked under 28 U.S.C. Section 1257 (3) because petitioner did not raise a substantial federal question.

QUESTIONS PRESENTED

Respondent will concede, (if this Court determines that a substantial federal question has been raised), that the questions posed by the petitioner in its brief on page 3 are substantially in conformity with the issues which this Court is asked to rule, however, respondent abhors the phrase "automatic imposition" found neatly nestled in each.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent concedes that petitioner has stated the proper provisions of the United States Constitution involved.

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case, except for its interpretation of the case of *Nashville, C. & St. L. Ry. v. Walters* 294 U.S. 405, found on pages 4 and 5 of its brief, and petitioner's self-serving pronouncement found on pages 6 and 7 that it had timely and properly raised Constitutional issues.

ARGUMENT

I.

THIS COURT IS WITHOUT JURISDICTION

This Court has and should adhere to the principle that it will not review a state court judgment based upon an adequate and independent non-federal ground. In the case of *Cramp v. Board of Public Instruction,* 368 U.S. 278, this Court stated:

> "Where the judgment of a state court rests upon two grounds, one of which is federal, and the other non-federal, in character, the Supreme Court of the United States is without jurisdiction to review if the non-federal ground is independent of the federal ground and adequate to support the judgment."

Petitioner has not contended that the Constitution of Florida deprives it of any rights secured by the Fourteenth Amendment. The Declaration of Rights, Section 12 of the Florida Constitution provides:

> "No person shall be subject to be twice put in jeopardy for the same offence, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken without just compensation."

And Article 16, Section 29 of the Florida Constitution provides:

> "No private property, nor right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner, or first secured to him by deposit of money; which compensation, irrespective of any benefit from any improvement proposed by such corporation or individual, shall be ascertained by a jury of 12 men in a court of competent jurisdiction, and shall be prescribed by law."

Petitioner's rights under the Florida Constitution were completely observed and an examination of the opinion of the Supreme Court of Florida will disclose that this case has been decided on grounds not involving any federal question.

II.

A SUBSTANTIAL FEDERAL QUESTION HAS NOT BEEN RAISED

Petitioner asserts that it has raised a substantial federal question in this case worthy of review. Respondent finds this rather hard to believe in the instant case, because it is under the impression that anyone claiming a right should be obligated to place the issue fully before the courts for a complete determination. Anything short of this standard tends to trap the court into rendering a decision not complete in scope or one that can be used for purposes never contemplated by the court in the first instance.

In Florida there are statutes, which the legislature passed in exercising its police powers, that require railroads to construct and maintain crossings and to erect certain crossing signals at the sole expense of the railroad. Section 351.03, Florida Statutes, provides:

> "Every railroad company, whenever its tracks crosses a highway, shall put up large signboards at or near said crossing with the following inscription in large letters on both sides of the boards: LOOK OUT FOR THE CARS! In all incorporated cities and towns the said company shall cause the bell on the engine to be rung before

crossing any of the streets of a city or town, and their trains shall not go faster, through any of the traveled streets of the city or town than at the rate of 12 miles per hour. This requirement for posting signs shall not apply to railroad crossings having signs as required by Section 317.455."

And Section 317.455, Florida Statutes, provides:

"Every railroad company operating or leasing any track intersecting a public road at grade and falling within the purview of Section 317.454, shall place and maintain a suitable signboard on each side of the track or tracks on the right side of the highway not less than ten feet from the ground and forty inches by fifty inches, two hundred feet from the crossing, which said board shall be painted with black lettering in white background with the following inscription thereon: STOP—RAILROAD CROSSING—FLORIDA LAW; provided, that for use at nights said signboard shall be equipped with a suitable mirror reflector or of such size, color and description as may be approved by the State Road Department for use at railroad crossings, so designated that same will reflect the rays of a motor vehicle headlights; and provide further, that where railroad warning signs have already been placed, or shall hereafter be placed, at any railroad crossing by the State Road Department, said railroad company shall not be required to erect or maintain additional signs or reflectors at such crossings."

And Section 357.01, Florida Statutes, provides:

> "All railroad companies, or persons owning or operating a line of railroad, log road or tram road in the state shall build, construct, maintain and keep in good condition highway crossings at all points where said line of railroad is crossed by any public, county or settlement road or by any public street where required by the board of county commissioners or the town council; such crossings to be constructed with as little slant as practicable, so as to render easy passage over same with loaded teams."

It is apparent, therefore, that these statutes impose upon the petitioner the very burden it protests in the instant case and yet petitioner (as the record reflects) never challenged the validity or reasonableness of these statutes, nay, did it ever so much as mention them either in the trial court or the Supreme Court of Florida. What inconsistency can this be? Is respondent to believe that one who acquiesces to a particular burden on hundreds of crossings, but rebels against it on one particular crossing, has genuinely raised a constitutional question? Perhaps petitioner assumed that in the instant case the trial court and the Supreme Court of Florida were under an obligation to adjudicate its constitutional rights in the light of statutes never brought to their attention or were required to breath into the petitioner's case omitted averments. If such be true, a procedure is born that is novel indeed.

Respondent submits that the judgment of the Supreme Court of Florida could not have been different than the one rendered in this case, or else that distin-

guished court would have fallen victim to the same inconsistency of which the petitioner stands indicted. Respondent does not over look the possibility that petitioner might have been trying to sandbag the courts in this instance, thereby gaining a valuable weapon to attack the validity of Sections 351.03, 317.455, and 357.01, *supra*, at a subsequent time. Therefore, can it not be said that if the petitioner had genuinely desired to have its rights under the United States Constitution adjudicated in this case, that it was under an obligation to place all of its cards on the table, so to speak, by challenging the validity of Sections 351.03, 317.455, 357.01, all Florida Statutes, thereby placing before the courts the complete problem at hand. For these reasons respondent feels that the petitioner did not raise a substantial federal question.

III.

DECISION BELOW IS IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT

If this Court determines that the petitioner has raised a substantial federal question, respondent submits that this Court has already answered the question and that the judgment of the Supreme Court of Florida is in accord with this Court's decisions.

The Supreme Court of Florida based its judgment on the 1897 decision rendered by this Court in the case of *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226. That case is on all fours with the instant case. Then as now, a crossing was condemned (at grade) over the tracks of a railroad and it was contended that the imposition of the cost to construct and main-

tain the crossing and the expense of installing and maintaining signal devices was taking of property without due process of law and an unlawful burden on interstate commerce. This Court stated:

> "The company must be deemed to have laid its tracks within the corporate limits of the city subject to the condition—not, it is true, expressed, but necessarily implied—that new streets of the city might be opened and extended from time to time across its tracks as the public convenience required, and under such restrictions as might be prescribed by statute.
>
> "The expenses that will be incurred by the railroad company in erecting gates, planking the crossing, and maintaining flagmen, in order that its road may be safely operated, —if all that should be required,—necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed, to have been taken by the company into account when it accepted the privileges and franchises granted by the state. Such expenses must be regarded as incidental to the exercise of the police powers of the state. What was obtained, and all that was obtained, by the condemnation proceedings for the public was the right to open a street across land within the crossing that was used, and was always likely to be used, for railroad tracks. While the city was bound to make compensation for that which was actually taken, it cannot be required to compensate the defendant for obeying lawful regulations enacted for the safety of the lives and property of the people."

Petitioner contends that this decision is outmoded and does not apply to present day conditions. In this assertion the petitioner relies on the case of *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405 (1935).

Since petitioner relies heavily upon the principle that old age is the villian in this case, the respondent will pursue this course of reasoning and up-date the principle of the Chicago Case to (what is sincerely hoped) an acceptable age. This Court then rendered a decision in 1920 in the case of *Erie Railroad Co. v. Board of Public Utility Comrs.*, 254 U.S. 394, concerning grade separations. In this case the railroad was ordered to make 15 grade separations in the city of Paterson, New Jersey. The railroad protested upon the following grounds: that the costs would be prohibitive; that the changes would only be for public convenience; that it was an unwarrantable interference with interstate commerce, (these 3 reasons are also advanced in the present case); and finally that the streets were laid out later than the railroad's establishment and therefore place an unfair burden on it. In answer to these contentions this Court held:

> "Grade crossings call for a necessary adjustment of two conflicting interests,—that of the public using the streets, and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent.

> Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is, and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road, it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil."

The next decision in point of time came in 1953 when this Court decided the case of *Atchison, Topeka & S. F. R. Co., v. Public Util. Com.*, 346 U.S. 346. In this case the railroad insisted that the allocation of grade separation costs should be imposed only on a benefit received basis and anything short of this was taking of property without due process of law and placed an unconstitutional burden upon interstate commerce, (exactly the same points raised in the

present case). The railroad introduced a great deal of evidence to the fact that it would receive no benefits from this grade separation; that the improvement would only facilitate traffic flow; that it was the 'revolution' in transportation that has caused the need for this type of improvement; and the severe competition the railroads are forced to endure by motor vehicles utilizing the public streets and highways. Respondent would point out here that petitioner, in the instant case, introduced the same type of evidence in great abundance before the trial court and more of the same can be found on pages 10 and 11 of its petition.

In any event, this Court stated:

> "Rather, in the cases at bar, the improvements were instituted by the State or its subdivisions to meet local transportation needs and further safety and convenience, made necessary by the rapid growth of the communities. In such circumstances, this Court has consistently held that in the exercise of the police power, the cost of such improvements may be allocated all to the railroads."

It is also interesting to note that this Court also discusses the *Nashville case* (294 U.S. 405) in this opinion and gives it an entirely different interpretation as does the petitioner herein. In fact, the Court states that the *Nashville case* is in complete harmony with the *Atchison case* and former decisions rendered by this Court on the same subject. Respondent realizes that the cases being cited usually concerned the elimination or separation of grades rather than the installation of signal devices or the construction and

maintenance of crossings, however, respondent feels that the same principle is involved.

The final case that respondent would like to mention is a 1962 decision by this Court in the case of *Goldblatt v. Town of Hempstead*, 369 U.S. 590. In this case the Town of Hempstead had an ordinance which prohibited excavations below two feet above maximum ground water level and the plaintiffs asserted that this ordinance prevented them from continuing their business, thereby taking their property without due process of law. This Court re-affirmed an 1887 opinion by stating:

> "As pointed out in *Mugler v. Kansas*, 123 U.S. 623, (1887): 'The present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or the use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by anyone, for certain forbidden purposes is prejudicial to the public interests. . . .'"

Now it can be seen that the so-called antiquated (and, therefore, horse and buggy decision petitioner would have us believe) has been up-dated 65 years to 1962, and that throughout these years this Court has ad-

hered to the same long-established rule that a state has the inherent power, by reasonable regulations, to protect the lives and to secure the safety of its people; and such regulations do not constitute a taking of private property for a public use. In the instant case, it was the petitioner who insisted that the crossing condemned was hazardous or 'critically dangerous' (a phrase used by petitioner on many occasions), and in need of signal devices.

Respondent submits that the State of Florida has passed regulations covering this problem and that they are reasonable in application, (a fact never challenged by the petitioner). It is therefore urged by the respondent that the judgment rendered by the Supreme Court of Florida be upheld as it is in complete accord with the decisions of this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DEAN TOOKER,

Counsel for Respondent

P. O. Drawer 1016

Stuart, Florida 33494

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Brief of the Respondent to Messrs. David W. Peck and Roy H. Steyer, Counsel for Petitioner, 48 Wall Street, New York, New York, 10005, by Air Mail this 26th day of July, 1965.

DEAN TOOKER,

Counsel for Respondent

BLANK
PAGE

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 9 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 335

FLORIDA EAST COAST RAILWAY,
a Florida corporation,
Petitioner,

v.

MARTIN COUNTY, a Political Subdivision
of the State of Florida,
Respondent.

REPLY BRIEF OF PETITIONER

DAVID W. PECK,
ROY H. STEYER,
Counsel for Petitioner
48 Wall Street
New York, N. Y. 10005

DAVID A. DONOHOE,
SULLIVAN & CROMWELL,
Of Counsel

August 9, 1965

INDEX

PAGE

I. THE JUDGMENT BELOW NECESSARILY PASSED UPON PETITIONER'S FEDERAL RIGHTS 2

II. SUBSTANTIAL FEDERAL QUESTIONS WERE PROPERLY CLAIMED 3

III. THE CASES CITED BY RESPONDENT EITHER DO NOT MEET PETITIONER'S CLAIM OR ACTUALLY SUPPORT IT 4

CONCLUSION 10

APPENDIX A

Extract From Brief of Martin County, Dated November 9, 1963, Submitted to the Supreme Court of Florida A–1

Extract From Brief of Florida East Coast Railway Company, Dated August 30, 1963, Submitted to the Supreme Court of Florida A–3

CITATIONS

CASES:

Atchison, T. & S. F. Ry. v. *Pub. Util. Comm'n.*, 346 U. S. 346 (1953) 6, 7, 8

Charleston Federal Savings & Loan Ass'n v. *Alderson*, 324 U. S. 182 (1945) 3

Chicago B. & Q. R. Co. v. *Chicago*, 166 U. S. 226 (1897) 4, 5

Chicago B. & Q. R. Co. v. *Illinois ex rel. Drainage Comm'n.*, 200 U. S. 561 (1906) 3

PAGE

Erie R. R. Co. v. *Public Util. Commrs.*, 254 U. S. 394 (1921) 5

Goldblatt v. *Hempstead*, 369 U. S. 590 (1962) 8, 9

Nashville C. & St. L. Ry. v. *Walters*, 294 U. S. 405 (1935) 5, 6, 7, 8

Rohr Aircraft Corp. v. *San Diego County*, 362 U. S. 628 (1960) 3

West Chicago St. R. Co. v. *Illinois ex rel. Chicago*, 201 U. S. 506 (1906) 3

Wilson v. *Cook*, 327 U. S. 474 (1946) 3

STATUTES:

Section 317.455, Florida Statutes 4, A–1

Section 320.46, Florida Statutes 4, A–1

Section 351.03, Florida Statutes 4, A-1

Section 357.01, Florida Statutes 4

Chapter 357, Florida Statutes 4, A–3

MISCELLANEOUS:

I. C. C. REPORT, *Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles*, 322 I. C. C. 1 (1964) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 335

FLORIDA EAST COAST RAILWAY,
a Florida corporation,

Petitioner,

v.

MARTIN COUNTY, a Political Subdivision
of the State of Florida,

Respondent.

REPLY BRIEF OF PETITIONER

Respondent's brief in opposition serves to highlight the fact that there are substantial rights under the Constitution of the United States involved here in the automatic and absolute imposition on a railroad of the entire cost of constructing and maintaining a grade crossing and the expensive protection devices needed therefor and in the refusal of the Florida court to consider the facts which would determine the fairness and reasonableness of the assignment of costs. We shall deal briefly with each of respondent's points in the order in which they were presented.

I

THE JUDGMENT BELOW NECESSARILY PASSED UPON PETITIONER'S FEDERAL RIGHTS

Respondent Martin County's first point is that this Court is "without jurisdiction" because the judgment of the Florida court rests upon a non-federal ground, independent of any federal ground, adequate to support it. Its argument appears to be that petitioner Railway has not contended to this Court "that the Constitution of Florida deprives it of any rights secured by the Fourteenth Amendment"; that (according to respondent) petitioner's rights under the Florida Constitution "were completely observed", and that the opinion of the Supreme Court of Florida discloses that this case was "decided on grounds not involving any federal question" (Resp. Br. 3-4).*

The answer to these contentions is that the Railway timely, properly and persistently raised its rights and objections under the Constitution of the United States (as well as the Florida Constitution) in both the trial court and the Supreme Court of Florida (see Pet'n 4-7, C-1—C-4), the federal rights thus set up are essential to a determination of the case and the necessary effect of the judgment was to deny them, and they cannot be evaded by the failure of the Florida court to refer to them or by any attempted interpretation of the Florida court's decision as resting on non-federal grounds. The Railway's claims—that its rights under the Fourteenth Amendment, and the interstate commerce clause as well, were violated by the automatic and arbitrary imposition of 100% of the costs on it—cover the

---

*"Resp. Br." refers to pages of the Brief for Respondent in Opposition. "Pet'n" refers to pages of the Petition for a Writ of Certiorari to the Supreme Court of Florida, filed July 9, 1965.

whole case and the rights of the parties could not be determined without deciding those claims. *West Chicago St. R. Co.* v. *Illinois ex rel. Chicago,* 201 U. S. 506, 519-20 (1906); *Chicago B. & Q. R. Co.* v. *Illinois ex rel. Drainage Com'rs,* 200 U. S. 561, 579-81 (1906).

II

SUBSTANTIAL FEDERAL QUESTIONS WERE PROPERLY CLAIMED

Without a single citation of authority, and completely ignoring the claims of Constitutional right which were timely and properly made by the Railway below, Point II of respondent's brief asserts that "a substantial federal question has not been raised" because, according to respondent, certain sections of the Florida Statutes cited therein "impose upon petitioner the very burden it protests in the instant case" but were never brought to the attention of the Florida courts or challenged as invalid or unreasonable (Resp. Br. 6). The argument is without legal significance and, in addition, is factually wrong.

1. Even if the alleged facts underlying respondent's argument were correct (and we shall show below that they are not), respondent's argument would not be maintainable. Its only significance would be that petitioner Railway could not proceed herein by way of appeal but would have to proceed by way of a petition for writ of certiorari, which it has in fact done in this case. *Rohr Aircraft Corp.* v. *San Diego County,* 362 U. S. 628, 629-30 (1960); *Wilson* v. *Cook,* 327 U. S. 474, 480-2 (1946); *Charleston Federal Savings & Loan Ass'n* v. *Alderson,* 324 U. S. 182, 184-7 (1945).

2. All three sections of the Florida Statutes cited by respondent were brought to the attention of the Supreme

Court of Florida. Two of them (§ 351.03 and § 317.455, which, as we show below, do not in any event relate to the burden which the Railway has protested) were cited to the Florida court by respondent itself, and the third (§ 357.01) was argued by the Railway not to be applicable.*

3. In its references to § 351.03 and § 317.455 of the Florida Statutes, dealing with certain crossing signals imposed by Florida on railroads, respondent's brief suggests to this Court that the types of crossing signals referred to in those sections are the crossing protection devices for which the Railway has sought compensation in this proceeding. The facts are otherwise. The types of crossing protection devices, the necessity and cost of which the Railway set up in its answer and was prevented from establishing by orders striking those portions of its answer and denying its offer of proof thereon, are automatic crossing protection devices, such as lights, bells and gates (whose construction costs alone were alleged to exceed more than $20,000), and not the relatively inexpensive sign boards or mirror reflectors covered by §§ 351.03 and 317.455.

III

THE CASES CITED BY RESPONDENT EITHER DO NOT MEET PETITIONER'S CLAIM OR ACTUALLY SUPPORT IT

The most striking feature of the effort in Point III of respondent's brief to "up-date" the 1897 case of *Chicago*

*Reprinted *infra* in Appendix A, at pp. A-1—A-2, is an extract from the brief of respondent Martin County, dated November 9, 1963 and submitted to the Supreme Court of Florida, which makes specific reference to and quotes §§ 351.03 and 317.455 (then numbered 320.46) of the Florida Statutes. Also reprinted *infra* in Appendix A, at p. A-3, is an extract from the brief of petitioner Railway, dated August 30, 1963 and submitted to the Supreme Court of Florida, which refers to Chapter 357 of the Florida Statutes (within which § 357.01 is included).

B. & Q. R. Co. v. *Chicago,* 166 U. S. 226, is that, like the opinion of the Supreme Court of Florida, it avoids any discussion or analysis of the 1935 case of *Nashville C. & St. L. Ry.* v. *Walters,* 294 U. S. 405, in which this Court dealt with the effect of the revolution in transportation on the relationship between a state's police power and the allocation of costs for railroad crossings.

The first "up-dating" case cited by respondent, *Erie R. R. Co.* v. *Public Util. Commrs.,* 254 U. S. 394, was decided in January 1921, some 14 years before the *Nashville* case and the same year that Tennessee enacted the statute which this Court said in the *Nashville* case had to be re-examined in the light of changed circumstances. In the *Erie* case, the majority was still proceeding upon the assumption, as expressed in the portion quoted in respondent's brief (p. 10), that the essential, indeed the whole, responsibility of danger in grade crossings rests with railroads, which it described as "the parties introducing the danger" (254 U. S. at 410).

The correctness of this assumption in connection with imposing the total cost of crossings on railroads was expressly rejected by this Court in its 1935 opinion in the *Nashville* case where, in holding unreasonable an automatic statutory imposition of 50% of the costs on a railroad, it found (294 U. S. at 422-3):

> "The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation." [Footnote omitted]

This conclusion was reflected in the like views of the Interstate Commerce Commission in its 1964 report entitled "Prevention of Rail-Highway Grade-Crossing Accidents

Involving Railway Trains and Motor Vehicles", 322 I. C. C. 1-92, discussed at pp. 9-10 of the Petition.

The discussion in respondent's brief (pp. 10-12) of *Atchison, T. & S. F. Ry* v. *Pub. Util. Comm'n,* 346 U. S. 346 (1953), which was cited in the Petition herein (p. 9), not only misstates the position of the petitioner in this case but also fails to state properly the rationale of the *Atchison* case. Respondent's discussion would make it appear (a) that the questions of whether grade separation costs should be allocated solely on a benefits received basis and whether anything short of this is a taking of property without due process of law and places an unconstitutional burden on interstate commerce are "exactly the same points raised in the present case," and (b) that the ultimate holding in the *Atchison* case was that the cost of such improvements could automatically be allocated to the railroad in the exercise of the police power without consideration of fairness and reasonableness.

In the first place, the petitioner Railway herein has not taken and does not take the position that the costs of grade crossings must be allocated only on a benefits received basis. Rather, it takes the position, which was expressed in the *Nashville* case and re-affirmed in the *Atchison* case, that benefits received are only one factor and that unless the assessment of the costs of public improvements bears a fair and reasonable relationship to all the specific circumstances and persons involved—the facts with respect to which the petitioner was never allowed to present in this case because the pertinent allegations in its answer were stricken and its proffer of proof denied—the allocation must be declared arbitrary and discriminatory.

In the *Atchison* case, the railroad relied solely on the contention, rejected by the Court, that the allocation of the costs of grade separation and improvements is arbitrary

unless imposed on the basis of benefits received. That, however, was not the end of the case or of the opinion. As the Court put it, 346 U. S. at 349:

> "The principal question presented by these appeals is whether the allocation of the reasonable cost of grade separation improvements is arbitrary as to railroads unless imposed on the basis of benefits received, or, since the costs are incurred in the exercise of the police power in the interest of public safety, convenience and necessity, may they be allocated on the basis of *fairness and reasonableness.*" [Emphasis supplied]

In that case, the Public Utilities Commission of California, after considering a variety of facts and evidence, of which benefits derived by the railroad were but one element, found that the railroad should pay 50% of the cost and the municipal authorities the other 50%—as against the railroad's claim that it should pay "only a small part of the costs or nothing, as the case may be" and the municipalities' claim that the "railroads should bear all the costs attributable to the presence of the tracks." (346 U. S. at 351-2) This Court found that "the California Commission considered all the evidence offered, including that going to the benefits received, and properly applied the rule of allocation sanctioned by this court," and that there was "no showing on these records of arbitrariness or unreasonableness in the Commission's orders, and none is claimed except as the Commission refused to allocate costs on the basis of benefits received, which we hold it was not required to do." (346 U. S. at 354)

This Court premised its finding upon the rule expressed in the *Nashville* case that costs could not be properly allocated on an arbitrary and unreasonable basis in the alleged

exercise of the police power. It pointed out that "this Court has consistently held that in the exercise of the police power, the cost of such improvements *may be* allocated all to the railroads" [emphasis in original], but went on immediately to say, citing *Nashville* for the purpose,

> "There is the proper limitation that such allocation of costs must be fair and reasonable."

and that this was the standard followed by the California Commission. (346 U. S. at 352) It then discussed the various facts shown in the *Nashville* case (346 U. S. at 353), summarized the holding of that case as

> "Thus, the contention of the railroad and the rule recognized by this Court in the *Nashville* opinion was that there could be an allocation of costs subject to the limitation that they be allocated always with regard to the rule against unreasonableness and arbitrariness."

and pointed out that the judgment of the Supreme Court of Tennessee had been reversed in the *Nashville* case and the case remanded because the Tennessee court had refused to consider whether, in light of the facts, the statute and order complained of in that case were arbitrary and unreasonable in automatically allocating 50% of the costs to the railroad. (346 U. S. at 354)

It is precisely the refusal of the Florida court herein to consider or to permit consideration of the facts involved, and its automatic imposition of 100% of the costs on the Railway on the ground of the exercise of the state's police power, excluding consideration of reasonableness and fairness, that form the basis for the petition for review by this Court.

The last case cited by respondent, *Goldblatt* v. *Hempstead,* 369 U. S. 590 (1962), adds nothing to respondent's

argument and, if anything, supports petitioner Railway. The essential question decided in that case was simply whether an ordinance prohibiting certain use of property by making excavations below a certain level unlawful was an appropriate exercise of the police power or whether it confiscated property without compensation by preventing the plaintiffs from continuing their business. There is no question raised to this Court in this case of respondent's power or authority to acquire the particular grade crossing or the use thereof. The only question raised to this Court is that of costs and compensation.

We point out, also, that in the *Goldblatt* case, this Court in the course of finding that the regulation there involved was justifiable, stated (369 U. S. at 594):

> "This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation."

It then went on to note that there was no showing in the record of "how much, if anything, the imposition of the ordinance would cost the appellants" and that the evidence on "reasonableness" was clearly indecisive (369 U. S. at 595), and said that since the burden on reasonableness was on the landowners-appellants and had not been met, the presumption of reasonableness and of valid exercise of police power would be applied (369 U. S. at 596). This Court was thus looking in the *Goldblatt* record for the very facts which the Florida court prevented the petitioner Railway from proving in this case, *i.e.*, the costs of construction and maintenance made necessary by respondent Martin County's action, and in so doing the Florida court deprived petitioner of its rights under the Constitution of the United States.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID W. PECK,
ROY H. STEYER,
Counsel for Petitioner
48 Wall Street
New York, N. Y. 10005

DAVID A. DONOHOE,
SULLIVAN & CROMWELL,
Of Counsel

August 9, 1965

APPENDIX A

EXTRACT FROM BRIEF OF MARTIN COUNTY, DATED NOVEMBER 9, 1963, SUBMITTED TO THE SUPREME COURT OF FLORIDA

"The wisdom and correctness of the decision [*Chicago B. & Q. R. R.* v. *Chicago*, 166 U. S. 226, at 255] can be seen when certain Florida Statutes are taken into consideration. Section 351.03, Florida Statutes, states:

> 'Every railway company, whenever its track crosses a highway, shall put up a large signboard at or near said crossing with the following inscription in large letters on both sides of the boards: 'look out for the cars'. In all incorporated cities and towns the said company shall cause the bell on the engine to be run before crossing any of the streets of a city or town, and their trains shall not go faster, through any of the travelled streets or a city or town, than at the rate of 12 miles per hour. This requirement for posting signs shall not apply to railroad crossings having signs as required by Section 320.46.'

"Section 320.46, Florida Statutes,[*] states:

> 'Every railroad company operating or leasing any track intersecting a public road at grade and falling within the purview of Section 320.45, shall place and maintain a suitable signboard on each side of the track or tracks on the right side of the highway not less than 10 feet

*Section 320.46 of the Florida Statutes, here referred to, is the predecessor of Section 317.455 referred to in respondent's brief in opposition to the petition. The former section was repealed, and the latter section added, by the Laws of 1963, effective January 1, 1964. The text is the same except for an internal reference to another section of the Florida Statutes which was also re-numbered by the 1963 revision.

Appendix A

Extract from Brief of Martin County, Dated November 9, 1963, Submitted to the Supreme Court of Florida

"from the ground and 40" x 40", 200 feet from the crossing, which said board shall be painted with black lettering in white background with the following inscription thereon: 'STOP—RAILROAD CROSSING—FLORIDA LAW'; provided, that for use at night said sign board shall be equipped with a suitable mirror reflector of such size, color and description as may be approved by the State Road Department for use at railroad crossings, so designated that same will reflect rays of a motor vehicle headlights; and provided further, that where railroad warning signs have already been placed, or shall hereafter be placed, at any railroad crossing by the State Road Department, said railroad company shall not be required to erect or maintain additional signs or reflectors at such crossings.' "

[pp. 16-17]

Appendix A

EXTRACT FROM BRIEF OF FLORIDA EAST COAST RAILWAY COMPANY, DATED AUGUST 30, 1963, SUBMITTED TO THE SUPREME COURT OF FLORIDA

"While it is not at all clear from the two opinions of the trial Court, the Order-Opinion of November 30, 1963 (40-49) and the Order Denying Petition for Rehearing of February 20, 1963 (55-58), it is probable that the trial Judge considered Chapter 357 Florida Statutes 1961, persuasive because that Chapter was very vigorously urged upon the trial Judge by Counsel for Petitioner. We submit that upon the authority of two cases that have never been overruled this statute cannot constitutionally be applied to a proposed or new county public road grade crossing in the slightest degree, unless and until the County obtains a valid easement therefor by one or more of the four recognized methods—eminent domain, grant, dedication or prescription over the right of way and tracks of a common carrier railroad. Such was the holding of the Florida Supreme Court in McDonald, Mayor, et al. vs. Louisville and N.R. Co., 65 Fla. 310, 61 Sou. 590, decided in March, 1913, and the case of Atlantic Coast Line R. Co. vs. Duval County, 114 Florida 254, 154 Sou. 331. . . ."

[p. 51]